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# FINDING A SOLUTION FOR PREGNANCY DISCRIMINATION: DID THE PREGNANCY DISCRIMINATION ACT FALL SHORT OF THE GOAL?

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## I. INTRODUCTION

Pregnancy—"the state of being with child".<sup>1</sup> For millions of working women pregnancy complicates the struggle for equality in the workplace.<sup>2</sup> Employers often exclude pregnancy-related benefits from their otherwise comprehensive disability policies.<sup>3</sup> This disparate

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1. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1949 (2d ed. 1959).

2. There are approximately 47 million employed women in the labor force, of which 31 million are in the prime childbearing years of 20 to 44. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 721, EMPLOYMENT IN PERSPECTIVE: WOMEN IN THE LABOR FORCE (2d Quarter 1985).

3. Many policies reflect the traditional notion that women of childbearing age will leave the workforce when they become pregnant. Therefore, employers often treat women as marginal workers and single them out for less favorable treatment. WOMEN'S LEGAL DEFENSE FUND, PREGNANCY DISCRIMINATION: A CASE STUDY OF THE IMPACT OF PUBLIC POLICY ON FAMILIES AND WORK (1982). Even if employers do hire or retain pregnant employees, the disability benefits employers provide often do not include pregnancy benefits. See, e.g., *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (Supreme Court upheld General Electric's policy that women could not work on the assembly line the last six months of pregnancy); *In Re Southwestern Bell Tele. Co.*, 602 F.2d 845 (8th Cir. 1979) (court rejected plaintiff's contention that the policy of refusing to pay disability benefits to females leaving work for normal pregnancy and childbirth violated Title VII). For a detailed historical view of pregnancy discrimination in the

treatment compounds the pregnant worker's plight.<sup>4</sup>

Recognizing this differential treatment, Congress implemented the Pregnancy Discrimination Act of 1978 (PDA).<sup>5</sup> Under the PDA, employers must treat pregnant employees the same for all employment related purposes as nonpregnant employees similarly situated in ability or inability to work.<sup>6</sup> The PDA, however, fails to answer definitively all questions concerning pregnancy discrimination.<sup>7</sup> Furthermore, an

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workplace see Erickson, *Pregnancy Discrimination: An Analytical Approach*, 7 WOMEN'S RIGHTS LAW REPORTER 11 (1981).

4. Not only must the pregnant employee deal with the physical and emotional trauma of bearing a child, she must also worry about the possible loss of income and job if her employer does not provide pregnancy-related disability benefits. An employer who provides benefits for other nonoccupational disabilities discriminates against women who become disabled due to pregnancy. See *infra* notes 109, 111-19 (cases striking down discriminatory pregnancy benefit policies).

5. 42 U.S.C. § 2000e(k) (1981) (amending 42 U.S.C. § 2000e (1964)). This section provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

6. The Senate report explains that the same treatment principle provided by the PDA is a restriction upon the employer's pregnancy related policy. The employer must focus not on the condition of pregnancy alone, but on the actual effects of that condition on the ability to work. Pregnant women who are able to work must be permitted to work under the same conditions as other employees. S. REP. NO. 331, 95th Cong., 1st Sess. 1 (1977). In introducing the bill, Senator Williams stated that the central purpose was to require employers to treat women workers equally on the basis of ability or inability to work. 123 CONG. REC. 29,385 (1977). One well-known authority on pregnancy discrimination notes that the legislative intent was to protect against discrimination on the basis of existing pregnancy and childbearing capacity. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641, 677 n.219 (1981).

7. The PDA left unanswered a multitude of questions. See, e.g., *Newport News v. EEOC*, 103 S. Ct. 2622 (1983) (whether PDA requires employers to extend benefits to dependents); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (whether attorneys who are shareholders in a professional corporation are "employers" for purposes of the Civil Rights Act); *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (whether a business necessity defense can save a policy that discriminatorily removes pregnant women from the workforce); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (elements of the plaintiff's prima facie case of discrimination under the PDA); *National Educ. Assn. v. Garrahy*, No. 83-04068 (D.R.I. Dec. 3, 1984) (level of benefits to be provided for abortions); *EEOC v. Group Hosp. Serv., Inc.*, 539 F. Supp. 185 (N.D. Tex. 1982) (time when the Act takes effect).

unresolved policy issue is whether the PDA's same treatment standard is the proper solution to employment problems women face because of their childbearing capabilities.<sup>8</sup>

Proponents of the PDA consider the same treatment standard an equitable solution for pregnant and nonpregnant employees. They argue that employers must treat pregnant employees the same as other employees who have disabilities preventing them from performing their jobs.<sup>9</sup> Opponents of the same treatment standard believe equality comes not from the treatment itself, but from the effect the treatment has on employment opportunities.<sup>10</sup> Therefore, women need special treatment for pregnancy-related disabilities to enjoy equal employment opportunities.<sup>11</sup>

Although the equal treatment and equal opportunity theories provide different solutions to the pregnancy discrimination problem, they rest on similar foundations. Both find support in the Pregnancy Discrimination Act's statutory language,<sup>12</sup> legislative history,<sup>13</sup> adminis-

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8. The pregnancy discrimination issue triggered a bitter debate among legal scholars. See *infra* notes 9-11 and accompanying text.

9. See generally Williams, *Reflection on Culture, Courts and Feminism*, 7 WOMEN'S RIGHTS LAW REPORTER 175 (1982). Professor Wendy Williams is one of the leading proponents of the equal treatment solution for pregnancy discrimination. She claims that special treatment makes women more expensive employees, consequently increasing the employer's incentive to discriminate against them. *Id.* at 196. She also claims that special treatment increases the hostility among workers. *Id.* See also *infra* notes 74-83 and accompanying text for a detailed discussion of Williams' view. For an overview of the pregnancy discrimination issue, including Williams' thoughts on the problem, see Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, July 22, 1984, at F1, col. 2. San Francisco Mayor Dianne Feinstein also speaks in favor of the equal treatment approach to pregnancy discrimination, claiming that the work market should not have to accommodate a special group of women having children. *Id.* at F23, col. 2. Richard E. Bradley, Vice-President of the Merchants and Manufacturers Association believes that "discrimination for is as bad as discrimination against." *Id.* at F23, col. 1.

10. See generally Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983). Linda Krieger, a staff attorney at the Employment Law Center in San Francisco, proposes that women should receive special treatment to provide them real equal opportunity in the workplace. Others support this theory. Maxine Waters, a California assemblywoman, vowed to fight for special treatment legislation. L.A. Daily J., April 4, 1984, at 4, col. 1.

11. The advocates of the equal opportunity approach believe equal treatment is not sufficient to redress the economic and social disadvantages pregnant employees suffer. See Krieger & Cooney, *supra* note 10. See also *infra* notes 141-63 and accompanying text (detailing the equal opportunity theory).

12. The first section of the PDA is divided into two clauses. The first clause de-

trative guidelines<sup>14</sup> and judicial interpretations.<sup>15</sup> To understand the complexity of the issues pregnancy discrimination presents, and the solutions proposed in response to the problem, it is helpful to examine each theory and its foundational components.<sup>16</sup> Following a detailed comparison of the two theories, this Note presents an evaluation of congressional action and possible compromise solutions.<sup>17</sup>

## II. LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT

### A. *Background: Pre-1978*

Historically, the law treated women paternalistically, supplementing the stereotypical view of women as marginal workers.<sup>18</sup> By 1964, the

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clares that pregnancy discrimination is sex discrimination. This is a clarification of 42 U.S.C. § 2000e-2(a) (1981), which provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The PDA's second clause sets forth a standard of treatment for women in the workplace: "Women affected by pregnancy shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ." 42 U.S.C. § 2000e(k). Courts often interpret the second clause as a mandate for equal treatment. *See infra* notes 71-81 and accompanying text. For one author's view on the proper construction of the PDA see Note, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 WASH. U.L.Q. 607 (1980).

13. *See infra* notes 84-90, 164-81 and accompanying text (legislative history supporting both the equal treatment and equal opportunity theories).

14. *See infra* notes 91-94, 182-88 and accompanying text (administrative guidelines lending support to each of the two theories).

15. *See infra* notes 95-137, 189-212 and accompanying text (courts interpretations supporting the equal treatment and equal opportunity theories).

16. *See infra* notes 67-140, 141-213 and accompanying text.

17. *See infra* notes 214-78 and accompanying text.

18. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908). The Supreme Court upheld an Oregon statute that limited the number of hours a woman could work each day. The Court believed women were too weak and dependent to work the same hours as men. Congressmen in the 1970's, however, aimed to rectify this historical characterization of women. The House report on the PDA indicates that women are subject to the stereotype that all women are marginal workers. Employers view women of child-bearing age as potential childbearers. Therefore, the congressmen reason, the elimination of dis-

cry for equality spurred Congress to enact Title VII of the Civil Rights Act of 1964,<sup>19</sup> which prohibits employment discrimination on the basis of sex.<sup>20</sup> Subsequently, the Equal Employment Opportunity Commission (EEOC)<sup>21</sup> prepared guidelines interpreting Title VII.<sup>22</sup> The EEOC determined that discrimination on the basis of pregnancy is discrimination on the basis of sex.<sup>23</sup>

In accordance with the Civil Rights Act and the EEOC's interpretation, courts struck down employer policies treating pregnant employees unfavorably.<sup>24</sup> In 1976, however, the Supreme Court addressed

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crimination based on pregnancy increasingly will provide equal opportunity. H.R. REP. NO. 948, 95th Cong., 2d Sess., 6-7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4754-55.

19. See 42 U.S.C. § 2000e (1981). For an overview of the legal community's attitude toward sex discrimination preceding the enactment of Title VII, see L.F. GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN* (1979). For a general discussion of the legislative history of sex-based discrimination, see Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967).

20. 42 U.S.C. § 2000e-2. See *supra* note 12. Representatives added the sex discrimination provision in an attempt to defeat the bill. The attempt failed and the bill passed in both houses. See 110 CONG. REC. 2577-84 (1964) (remarks of Rep. Smith who offered the amendment, and remarks of others such as Rep. Cellar who opposed the measure); *Id.* at 2584 (remarks of Rep. Green citing absence of reports and legislative hearings as signs of uncommendable manipulation).

21. Congress charged the EEOC with the administration of Title VII. 42 U.S.C. § 2000e-5 (1981). For an overview of the EEOC's role in implementing Title VII's sex discrimination policy, see Comment, *The Pregnancy Discrimination Act of 1978 and the EEOC Guidelines: A Return to "Great Deference?"*, 41 U. PITT. L. REV. 735 (1980). Generally, courts afford the guidelines great deference, but there are exceptions. In *General Elec. Co. v. Gilbert*, the Supreme Court noted that there are times when the courts would not feel compelled to follow the guidelines. 429 U.S. 125, 140-45 (1976).

22. The EEOC's Guidelines on Sex Discrimination have not been changed since their formulation in 1978. See 29 C.F.R. § 1604 (1985).

23. The guidelines explicitly state that discrimination based on pregnancy is a *prima facie* violation of the sex discrimination provision of Title VII. 29 C.F.R. § 1604.10 (1985). Section 1604.10(a) of the guidelines provides that "[a] written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth, or other related medical conditions is a *prima facie* violation of Title VII." See also 29 C.F.R. § 1604.10(b) (1985), which provides that "[d]isabilities caused . . . by pregnancy . . . for all job related purposes, shall be treated the same as disabilities caused . . . by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. . . ." See also 29 C.F.R. § 1604.10(c) (1985), which provides that "[w]here the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

24. All federal circuit courts that addressed pregnancy discrimination before 1976

pregnancy discrimination under Title VII,<sup>25</sup> and held that discrimination based on pregnancy was not discrimination based on sex.<sup>26</sup> In *General Electric Co. v. Gilbert*,<sup>27</sup> the Court upheld General Electric's insurance plan, which excluded pregnancy-related disabilities from coverage.<sup>28</sup> Disregarding lower court decisions<sup>29</sup> and EEOC guidelines,<sup>30</sup> Justice Rehnquist concluded that disparity of treatment between pregnancy-related disabilities and other disabilities did not constitute sex discrimination.<sup>31</sup> The exclusion of pregnancy from the list of covered disabilities was condition-related, not gender-related, and was therefore valid.<sup>32</sup>

Subsequently, in *Nashville Gas Co. v. Satty*,<sup>33</sup> the Court again upheld a policy denying sick leave benefits to pregnant women.<sup>34</sup> The Court,

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held that pregnancy discrimination was sex discrimination under Title VII. *See, e.g., Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975) (Title VII prohibits exclusion of pregnancy-related disabilities from company employee disability benefit program); *Communications Workers v. A.T.&T.*, 513 F.2d 1024 (2d Cir. 1975) (disparity of treatment between pregnancy-related and other disabilities in the employment context violates Title VII); *Farkas v. Southwestern City School Dist.*, 506 F.2d 1400 (6th Cir. 1974) (failure to pay teachers sick leave for absences related to pregnancy constitutes discrimination on the basis of sex). When considering the PDA, Congress noted that these decisions reflected the original intent of Title VII. *See H.R. REP. NO. 948*, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749.

25. The Supreme Court had previously considered pregnancy discrimination in the face of constitutional challenges. In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), the Court held that school board policies requiring pregnant teachers to take maternity leave four months before the expected delivery date violated the fourteenth amendment's due process clause, although a flexible leave policy would not. *Id.* at 651. In *Geduldig v. Aiello*, 417 U.S. 484 (1974) the Court found that exclusion of benefits for normal pregnancy from a disability plan did not violate the fourteenth amendment's equal protection clause.

26. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976).

27. *Id.*

28. *Id.* at 129.

29. *See supra* note 24.

30. *See supra* note 23. Justice Rehnquist refused to defer to guidelines which the EEOC formulated eight years after the passage of the Civil Rights Act of 1964. He claimed they did not have the force of law. 429 U.S. at 140-46.

31. 429 U.S. at 136.

32. *Id.* at 139. Justice Rehnquist concluded that pregnancy related disabilities "constitute an *additional* risk, unique to women and failure to compensate for them does not destroy the presumed party of the benefits, accruing to men and women alike, which result from facially evenhanded inclusion of risks." *Id.* (emphasis in original).

33. 434 U.S. 136 (1977).

34. *Id.* at 143-46.

however, struck down a companion policy denying accrued seniority to women on maternity leave.<sup>35</sup> The Court found the seniority and medical benefit policies distinguishable. Depriving women of seniority benefits was not merely "a refusal to extend women a benefit men cannot receive, but imposed on a woman a substantial burden she need not suffer."<sup>36</sup>

As a result of these decisions,<sup>37</sup> an employer could single out pregnancy-related benefits for unfavorable treatment so long as such treatment did not otherwise deprive female employees of employment opportunities.<sup>38</sup> Congress' failure to include pregnancy discrimination in the definition of sex discrimination, as well as the Supreme Court's determination that pregnancy discrimination was not sex discrimination, left those dealing with charges of pregnancy discrimination unsure of the proper legal path to follow.<sup>39</sup>

### B. *The Pregnancy Discrimination Act*

Congress acted immediately to clarify the state of confusion surrounding the pregnancy discrimination issue. The legislators amended

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35. *Id.* at 139-42. The Supreme Court apparently wavered from the hard stance it took in *Gilbert*. The Court struck down a portion of the company's policy that denied employees returning from pregnancy leave their accumulated seniority. *Id.* at 141. The Court even looked to EEOC guidelines in making the decision. *Id.* at 142 n.4.

36. *Id.* at 142.

37. See *Gilbert*, 429 U.S. at 128 and *Satty*, 434 U.S. at 136. See also Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591 (1982) (traces the pregnancy discrimination issue through the passage of the PDA).

38. After *Gilbert*, some lower courts upheld the exclusion of pregnancy benefits from disability plans. See, e.g., *Eberts v. Westinghouse Elec. Corp.*, 581 F.2d 357 (3d Cir. 1978) (the company's disability insurance policy, which paid male employees non-occupational sickness benefits, but denied benefits to women absent from work because of pregnancy, did not unlawfully discriminate against pregnant employees). Courts, however, did not always follow the *Gilbert* rationale. Compare *Mitchell v. Board of Trustees*, 15 Fair Empl. Prac. Cas. (BNA) 338 (D.S.C. 1977) with *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977).

39. See, e.g., *DeLauier v. San Diego Unified School Dist.*, 588 F.2d 674 (9th Cir. 1978) (ninth month mandatory pregnancy leave for teachers does not violate the fourteenth amendment, but denial of sick days for maternity leave violates Title VII). Some lower courts, looking to the safety of third persons, sustained pregnancy-related policies which limited the activities of pregnant employees. See *In re National Airlines*, 434 F. Supp. 249 (D. Fla. 1977) (although the question of fetal health is immaterial, maternity leave that required a stewardess to leave her job upon discovery of pregnancy is a violation of Title VII, while mandatory leave in the twentieth week is not a violation because the policy protects passengers).



Title VII by adding the Pregnancy Discrimination Act of 1978 (PDA).<sup>40</sup> Overruling the Supreme Court's interpretation of sex discrimination,<sup>41</sup> Congress declared that discrimination based on pregnancy, childbirth or related medical conditions is discrimination based on sex.<sup>42</sup> To guarantee working women protection from disparate treatment, Congress added a substantive provision to the statute. "Women affected by pregnancy . . . shall be treated the same . . . as others not so affected but similar in their ability or inability to work."<sup>43</sup>

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40. 42 U.S.C. § 2000e(k) (1981). On March 15, 1977, Sen. Williams introduced S. 995 and Rep. Hawkins introduced H.R. 5055, which was reintroduced as H.R. 6075. The Senate Subcommittee on Labor reported S. 995 to the full Committee on Resources, which amended the bill to add an effective date and to provide for adjustment of existing benefit plans. The Senate passed S. 995 on September 16, 1977. The House Subcommittee on Employment Opportunities reported H.R. 6075 to the full Committee on Education and Labor, which amended the bill to provide for the exemption of abortion from fringe benefits. The House passed H.R. 6075 on July 18, 1978. Subsequently, the House Committee of Conference met to consider S. 995 and to issue a report. The Senate agreed to the abortion amendment and passed S. 995 on October 13, 1978. The House approved the bill on October 15, 1978. See H. REP. NO. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749; H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4765; S. REP. NO. 331, 95th Cong., 1st Sess. (1977). The Senate report clarified the purpose of the bill: "This bill is intended to make plain that under Title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex." *Id.* at 3. For the text of 42 U.S.C. § 2000e(k) (1981), see *supra* note 5.

41. The Supreme Court in *Gilbert* had held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. See *supra* notes 25-32 and accompanying text.

42. See Furnish, *Prenatal Exposure to Fetal Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 79 (1980). At least one congressman noted that disagreement with *Gilbert* was the inspiration for the legislation. See 123 CONG. REC. 29,387 (remarks of Sen. Javits).

43. The Senate report explains that the purpose of the PDA is to change the definition of sex discrimination in Title VII to reflect this "common sense" view and to protect working women against all forms of employment discrimination. S. REP. NO. 331, *supra* note 40, at 3. The House report points out the confusion created by the *Gilbert* and *Satty* decisions:

H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the common sense view and to ensure that working women are protected in all forms of discrimination based on sex. By making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*.

H.R. REP. NO. 948, *supra* note 40, at 3. The House also reaffirmed the idea of equal treatment in all aspects of employment: "H.R. 6075 unmistakably reaffirms that sex

The PDA provided an immediate solution to the situation Congress attempted to rectify.<sup>44</sup> Although there is evidence that Congress recognized the pregnant worker's unique situation,<sup>45</sup> because Congress was working in reaction to the Supreme Court's *Gilbert* decision,<sup>46</sup> it chose only to impose an equal treatment standard upon employers;<sup>47</sup> Congress wanted to countermand the Supreme Court's *Gilbert* decision.<sup>48</sup> Throughout the debates,<sup>49</sup> hearings<sup>50</sup> and reports,<sup>51</sup> congress-

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discrimination includes pregnancy discrimination, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of ability to work." H.R. REP. NO. 948, *supra* note 40, at 3. See also H.R. CONF. REP. NO. 1786, *supra* note 40, at 3.

44. 42 U.S.C. § 2000e(k). Beyond merely redefining the term "sex," Congress implemented the Act to guarantee working women protection against differential treatment by setting out a specific standard for employers to follow. The statute mandates "same treatment" for all employees. *Id.* Senator Williams remarked: "The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work . . . . In this way the law will protect women from the full range of discriminatory practices which have adversely affected their status in the workforce." 123 CONG. REC. 29,385 (1977) (remarks of Sen. Williams). Congress intended for this Act to apply to all aspects of employment—hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority and other conditions covered by Title VII. See H.R. REP. NO. 948, *supra* note 40, at 4.

45. The blunt statutory language of the PDA masks much of Congress' decision-making process. Cost to the employer, abortion benefits, impact on the family, women as marginal workers, and effects of childbearing are among the topics the legislators discussed in reaching their decision. See, e.g., 124 CONG. REC. 21,435-42 (1978). See *infra* notes 169-74 and accompanying text.

46. For example, the Senate report notes: "The bill defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women . . . ." S. REP. NO. 331, *supra* note 40, at 4.

47. "The touchstone of compliance with S. 995 is equality of treatment . . . ." 123 CONG. REC. 29,645 (1977) (remarks of Sen. Stafford).

48. 429 U.S. 125. The Supreme Court handed down the *Gilbert* and *Satty* decisions, upholding policies unfavorable to pregnant employees, less than one year before congressmen introduced the pregnancy discrimination bills. Congress worked from the viewpoint that pregnant women received fewer disability benefits than other employees similarly disabled. Thus, their immediate goal was to raise the level of benefits for pregnancy disabilities up to the level given for other nonoccupational disabilities. See S. REP. NO. 331, note 40, at 2.

49. See, e.g., 123 CONG. REC. 29,660 (1977). Senator Javits explained that the Act simply meant that if coverage or benefits are given, employers must treat pregnancy the same as other nonwork related disabilities. *Id.* at 29,387.

50. See, e.g., *Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 95th Cong., 1st Sess. 287 (1977).

men imposed an obligation on employers to accommodate for pregnancy-related disabilities with regard to the employee's ability to perform the job.<sup>52</sup> To allay fears of those who believed the Act would unduly burden employers, proponents announced that only those employers providing benefits for other nonoccupational disabilities must extend the same level of benefits for pregnancy-related disabilities.<sup>53</sup> The Act prohibits discriminatory treatment but does not require employers to treat pregnant employees in any particular manner. They must only treat pregnant employees in the same manner as they treat other employees similarly disabled.<sup>54</sup>

Despite the unambiguous statutory language and the multiple references to equal treatment,<sup>55</sup> specific references to equal opportunity are also scattered throughout the legislative history.<sup>56</sup> Congress recognized indirectly the pregnant worker's special needs. For example, Congress endorsed the *Gilbert* dissent, which specifically noted that the capacity to become pregnant distinguishes the sexes.<sup>57</sup> Also, in examining statistics of frequency and longevity of pregnancy-related disabilities, Congress acknowledged the impact of childbearing upon

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51. See, e.g., S. REP. NO. 331, *supra* note 40, at 4. See also H.R. REP. NO. 948, *supra* notes 40, 43.

52. The Senate report states as follows: "The bill prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner . . . . The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." S. REP. NO. 331, *supra* note 40, at 4.

53. See 123 CONG. REC. 29,663 (1977) (the bill makes it clear that an employer must provide benefits on an equal basis if he provides benefits at all because the bill does not require an employer to do anything more for his pregnant employees than he does for any other employee) (remarks of Sen. Mathias).

54. See S. REP. NO. 331, *supra* note 40, at 4. Congress restricted the benefits given to a pregnant woman to compensate for time lost while medically unable to work. 123 CONG. REC. 29,662 (1977). Congress compared pregnancy to other voluntary disabilities, such as hair transplants and vasectomies. See, e.g., 123 CONG. REC. 26,941, 29,661 (1977).

55. See *supra* notes 44-54 and accompanying text.

56. See, e.g., 123 CONG. REC. 29,663 (1977) (noting that the Act is vital to the equal employment opportunity of all women in this country) (remarks of Sen. Mathias); see also 124 CONG. REC. 21,437 (1978) (legislation which requires that pregnant women be treated the same as other employees on the basis of their ability or inability to work will help provide equal employment opportunities for millions of women) (remarks of Rep. Green).

57. See, e.g., 123 CONG. REC. 29,641 (1977) (quoting Justice Steven's dissent in *Gilbert*, which states that pregnancy is the characteristic that differentiates men and women) (remarks of Sen. Bayh).

employment opportunities.<sup>58</sup> In addition, legislators showed concern not only for the pregnant employees but also for their families.<sup>59</sup> Although Congress was working to remedy the immediate shortcomings of pregnancy-discrimination policies,<sup>60</sup> it was aware that the unique position of pregnant employees might require a special standard. Nonetheless, Congress failed to accommodate for the disparate impact an equal opportunity theory could avoid.<sup>61</sup>

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58. Figures cited indicate that about 85% of all working women become pregnant at some time during their working lives. 123 CONG. REC. 29,388 (1978). Seventy percent of female employees work out of necessity, and 40% are employed during pregnancy. *Id.* at 29,386. The average leave time for a pregnant woman is six to eight weeks. *Id.* at 29,642.

Congress, however, failed to compare the problems caused by pregnancy to other types of disabilities, except disabilities such as broken arms. If the legislators had examined the impact of these other "shared" disabilities upon the ability to work, they may have arrived at a different conclusion about the equal treatment approach. They did recognize the side-effects of pregnancy itself, such as miscarriage and toxemia, which a man would not experience. *Id.* at 29,641.

59. One Senator pointed out that not only women, but their families as well, often bear the burdens that can accompany pregnancy:

Without this legislation, they may face a series of obstacles to continuing the pregnancy to term while maintaining their jobs and their incomes. Many women temporarily disabled by pregnancy have been forced to take leave without pay or to resign. In so doing, they have forfeited the income which holds their families together, which helps assure their children adequate nutrition and health care, and which helps keep their families from resorting to welfare. Faced with the dual cost of being forced to pay their medical costs plus losing their wages, many low-income women have felt that only one alternative remained—even unwanted abortion. Where other employees who face temporary periods of disability do not have to face the same loss, it is especially important that we not ask a potential mother to undergo severe disadvantages in order to bring another life into the world. I would hope that we all can see the injustice that has occurred and that continues to occur without this bill.

123 CONG. REC. 29,387 (remarks of Sen. Javits).

60. Congress was working to remedy the *Gilbert* situation. See 123 CONG. REC. 29,661 (1977). Sen. Cranston cited the General Electric plan that gave all employees a disability plan paying weekly nonoccupational sickness benefits, excluding pregnancy, as typical of the practices of companies at that time. *Id.*

61. The PDA was important because "a large number of working women need its protection for their financial security and the security of their families." 123 CONG. REC. 29,385 (remarks of Sen. Williams) (emphasis added). Sen. Williams remarked that  $\frac{2}{3}$  of female employees work because of economic need and that the median earnings of women who work is 40% less than the median of male employees. *Id.* These remarks indicate that Congress realized the exclusion of pregnancy benefits imposed a dual burden upon women. Thus, they acted to remove the burdens related to employment. Many find the PDA's solution to pregnancy discrimination in employment unsatisfactory. See *infra* notes 141-63 and accompanying text for a detailed discussion of

To complement the PDA, the EEOC reissued pregnancy discrimination guidelines<sup>62</sup> and added a series of thirty-seven "Questions and Answers on Pregnancy Discrimination"<sup>63</sup> which embody the same treatment standard.<sup>64</sup> At one point, however, the guidelines vary from the strict equal treatment standard. They require an employer to provide "adequate" leave to pregnant employees unless excused for reason of business necessity.<sup>65</sup> Therefore, the EEOC recognized pregnancy's impact on employment opportunity and accordingly acted to alleviate the disparity.

Thus, the legislative history and the administrative guidelines favor the equal treatment policy. Yet, both acknowledge the exceptional situation pregnancy presents and hint that special treatment is necessary for women to attain equal employment opportunities. This double standard forms the basis of two major theories, each claiming to be the

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the merits of the equal opportunity theory, an alternative to the PDA's equal treatment standard.

62. 29 C.F.R. § 1604.10 (1985). The EEOC had developed guidelines interpreting the sex discrimination portion of the Civil Rights Act. The guidelines explicitly state that discrimination based on pregnancy is a *prima facie* violation of the sex discrimination provision of the Civil Rights Act. The courts historically have given great deference to the EEOC guidelines. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), in which Chief Justice Burger wrote that the EEOC guidelines are entitled to great deference as they express Congressional will. But see *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976), in which the Supreme Court refused to give the guidelines deference. See generally Comment, *supra* note 21, at 746-49 (historical account of judicial treatment of EEOC regulations).

63. See *Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. § 1604.10 (App. 1985), in which the EEOC formulated questions and answers to address the confusing aspects of the Act. The questions and answers address, *inter alia*, date of effect, terminations, leaves of absence, benefits, ability to perform, insurance and disability plans.

Also, pursuant to the passage of the Act, the EEOC and the Department of Labor formulated Proposed Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7516 (1980), *withdrawn*, 46 Fed. Reg. 3916 (1981) that suggested tests for pregnancy-based discrimination cases and evaluated policy rules for employers to follow. The agencies withdrew these guidelines because they decided that case-by-case enforcement of the guidelines was a more appropriate method to follow. 46 Fed. Reg. 3916 (1981).

64. See 29 C.F.R. § 1604.10 (1985); see also *supra* notes 22-23.

65. "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." 29 C.F.R. § 1604.10(c) (1985).

correct solution to pregnancy discrimination.<sup>66</sup>

### III. THE CORRECT SOLUTION: EQUAL TREATMENT OR EQUAL OPPORTUNITY?

As one legal scholar notes, "equality can be seen as an individual right to equal treatment or as a social policy promoting equality of effect."<sup>67</sup> The pregnancy discrimination debate rages between two distinct groups. Proponents of an equal treatment policy for pregnancy-disabled employees see equality in treatment as the major concern.<sup>68</sup> Advocates of preferential treatment for pregnant employees focus on equality in result.<sup>69</sup> Although radically different in rationale and practice, both the equal treatment and equal opportunity theories look to the Pregnancy Discrimination Act's language,<sup>70</sup> legislative history,<sup>71</sup> administrative guidelines<sup>72</sup> and judicial interpretations<sup>73</sup> for support.

#### A. *Equal Treatment Theory*

##### 1. The Theory

The equal treatment theory embodies the same treatment standard the PDA imposes to remedy disparate treatment.<sup>74</sup> Under this theory,

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66. See *infra* notes 74-84, 141-63 and accompanying text for a review of the equal treatment and equal opportunity theories.

67. Krieger & Cooney, *supra* note 10, at 554.

68. See *infra* notes 74-83 and accompanying text.

69. See *infra* notes 141-63 and accompanying text.

70. See *infra* notes 84-85, 164-67 and accompanying text.

71. See *infra* notes 86-90, 168-81 and accompanying text.

72. See *infra* notes 91-94, 182-88 and accompanying text.

73. See *supra* notes 96-137, 189-212 and accompanying text.

74. Equal treatment theorists argue that a policy of disparate treatment based on pregnancy is discriminatory on its face. The employer's only defense to such a charge is that the policy constitutes a bona fide occupational qualification (BFOQ). The employer's BFOQ claim admits discrimination and attempts to justify it by claiming that the position requires possession of a unique characteristic for successful job performance. The employer must be able to prove that the distinguishing characteristic of the disfavored class members prevents them from performing their duties safely and efficiently. "If the employer succeeds in establishing that the discriminatory policy is a BFOQ exception, then the burden shifts to the plaintiff to show that the employer's justification is merely pretext for discrimination." Note, *The Pregnant Employee's Appearance as a BFOQ Under the Pregnancy Discrimination Act*, 14 LOY. U. CHI. L.J. 195, 213-14 (1982). The author notes that although the PDA redefined sex discrimination to include pregnancy discrimination, Congress carved out an express exception to Title VII's prohibition against sex discrimination:

differential treatment for any employment-related purpose can be justified only by differences in the ability to work, not by differences in the conditions that cause the inability.<sup>75</sup> The employer can treat the pregnant employee neither better nor worse than nonpregnant disabled co-workers, because in the workplace all disabilities may impede the ability to work.<sup>76</sup>

This theory emphasizes the similarities between the sexes, minimizing the significance of gender reproductive differences.<sup>77</sup> The emphasis on the similarities of the rights and needs of both sexes encourages employers to treat all employees the same.<sup>78</sup> Treating women the same as men ultimately will allow women to gain equality through competition in the workplace.<sup>79</sup>

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The BFOQ defense allows employers to justify dissimilar treatment toward pregnant employees and to discriminate openly on the basis of sex without violating Title VII. . . . The BFOQ exception to Title VII's general mandate of equal opportunity in employment for all allows employers to discharge or demand leave of absence from visibly pregnant women when the dominant aspect of the employee's job and essence of the employer's business are to provide vicarious or "attenuated" sex.

*Id.* at 226-27. The author advocates removing pregnancy discrimination from the statutory exception. *Id.*

75. One author labels this view the "liberal model of equality." This model's adherents believe in a strict equal treatment theory. See Krieger & Cooney, *supra* note 10, at 537 (the authors examine the theory, although they do not advocate it). Herma Hill Kay labels this model the "assimilationist" model because it implies that the law should treat women and men as if they are interchangeable. Kay, *Models of Equality*, 1985 U. ILL. L.F. 39, 40. Other theorists have developed their own models of equality. Elizabeth Wolgast proposes the "bivalent model." She asserts that the differences between men and woman are substantial and sexual equality will result only if society deals with sex differences by developing special rights which lead to equality of result. E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980). Professor Ann Scales advocates an "incorporationist" approach. In this model women have rights different from men only with respect to sex-specific conditions that are completely unique to women. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1980-81).

76. See Williams, *supra* note 9, at 193.

77. This theory assumes that there are no differences between the sexes that cannot be dismissed as illusory sex-stereotypes, or which cannot be effectively compared to and treated the same as cross-sex analogous conditions. See Krieger & Cooney, *supra* note 10, at 538.

78. *Id.* The authors note that the liberal model of sexual equality is based upon two fundamental assumptions. The first is "that there are no differences between the sexes which cannot be dismissed as illusory sex-stereotypes," and the second is that "once all vestiges of disparate treatment are removed, men and women will achieve equal status through freedom of choice and equal competition in the social and economic marketplace." *Id.*

79. *Id.* Proponents of the equal treatment theory believe women will benefit from

The equal treatment theory attempts to avert dangers its proponents believe are inherent in special treatment statutes. First, they argue, the special treatment statutes treat women in ways that historically have harmed them.<sup>80</sup> Second, if an employer focuses on one class, the employer engenders feelings that it no longer cares for all employees.<sup>81</sup> Third, employers may avoid hiring women of childbearing age to avoid the obligations of preferential statutes.<sup>82</sup> Last, the statutes allow judges to infuse their own values in the decisionmaking process.<sup>83</sup> Equal treatment advocates argue that the PDA avoids many of these stereotypical dangers and generates equality as it eliminates sexist distinctions based on pregnancy.<sup>84</sup>

## 2. The Legislative and Administrative Basis

Both the PDA's statutory language and legislative history support the equal treatment theory. The Act specifically requires employers to treat pregnant workers the "same" as other persons similarly situated in ability to perform the job.<sup>85</sup> This black-letter rule embodies a basic tenet of the equal treatment theory, affording advocates a strong argument that state laws and employer policies should neither bestow more nor provide fewer benefits on pregnant employees than upon compara-

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policies that insist on adequate medical coverage for all workers. Williams, *supra* note 9, at 196. Isabelle Katz Pinzler, a women's rights attorney for the ACLU, stated that the organization was fighting for national legislation guaranteeing temporary disability leave for all workers. N.Y. Times, July 22, 1984, at F23, col. 3.

80. See generally *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 122 (1977) (distinctions based on pregnancy tend to perpetuate the stereotype of a woman as a childbearer rather than wage-earner). *Id.* at 307. Bella Abzug, Presiding Officer, National Commission on the Observance of International Women's Year, testifying in support of the bill stated: "[D]ramatic illustration of economic need can be seen in the growing percentage of families headed by women who can ill afford disruption in their earnings for themselves and their children." *Id.* at 309. Abzug noted that at the time of consideration of the bill about 40% of working women whose employers had disability plans were not covered for pregnancy related disabilities.

81. See Taub, BOOK REVIEW, 80 COLUM. L. REV. 1686 (1980).

82. Williams, *supra* note 9, at 196. Title VII does not permit such practices, but proof of employer motivation is difficult to establish. *Id.* at 196 n.115.

83. *Id.* at 196. Equal opportunity advocates deny the proposition that preferential treatment inordinately encourages judges to impose personal bias upon decisions. Krieger & Cooney, *supra* note 10, at n.92.

84. Williams, *supra* note 9, at 197-98.

85. 42 U.S.C. § 2000e(k). See *supra* note 5.



bly disabled coworkers.<sup>86</sup>

Coupling the Act's unambiguous language with its legislative history reinforces the argument for equal treatment. The legislative history is replete with congressional pronouncements of the theory.<sup>87</sup> Assurances that no employer must provide any benefits to pregnant workers beyond those he provides other disabled employees are scattered throughout the record.<sup>88</sup> In addition, Congress specifically addressed those fears that had prompted the development of the equal treatment theory.<sup>89</sup> Congress noted that employers no longer may view women as marginal workers merely because of their childbearing capacity.<sup>90</sup> Possibly as important as the favorable comments Congress made on the equal treatment theory is the absence of specific suggestions that pregnant women should enjoy preferential treatment.<sup>91</sup> This omission supports the interpretation that although Congress disapproved of reduced pregnancy benefits, they did not necessarily believe that pregnancy discrimination problems called for preferential treatment.

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86. See generally Williams, *supra* note 9.

87. For example, Sen. Williams remarked that "[t]he key to compliance in every case will be equality of treatment." 123 CONG. REC. 29,385 (1977).

88. Sen. Javits noted that the PDA does not require employers to provide any specific benefits to pregnant employees: "The bill adopts as its standard *equality of treatment*, and thereby permits the personal and fringe benefit programs already in existence for other similar conditions to be the measure of an employer's duty toward pregnant employees." 123 CONG. REC. 29,387 (1977) (emphasis added).

89. See *supra* notes 80-83 and accompanying text. Congress specifically intended to arrest the stereotypical attitude employers had toward pregnant workers. The Senate report notes that "the assumption that women will become pregnant and leave the labor market is at the core of sex stereotyping resulting in unfavorable disparate treatment of women in the workplace. A failure to address discrimination based on pregnancy . . . would prevent the elimination of sex discrimination in employment." S. REP. NO. 331, *supra* note 40 at 3. Senator Brooke rejected the notion that the PDA would grant pregnant workers special benefits: "S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men." 123 CONG. REC. 29,664 (1977).

90. Women are often seen as marginal workers. Employers often refused women certain jobs and training because of concern that they would leave the employer's services. Congress enacted the PDA to close these gaps and protect women from the full range of discriminatory practices adversely affecting their status in the workforce. See 123 CONG. REC. 29,385-88 (1977).

91. Congress did not directly endorse preferential treatment of pregnant women, although they did note some state laws that provide special treatment for pregnant workers. They also referred to state statutes that require equal treatment similar to the PDA. See H. REP. NO. 948, *supra* note 40, at 4759.

Therefore, Congress concluded that uniform disability policies more satisfactorily resolved the equality debate.

Administrative implementation of the PDA reaffirmed the equal treatment view.<sup>92</sup> In the guidelines<sup>93</sup> and appendix,<sup>94</sup> the EEOC interpreted the Act as mandating "same treatment." For example, the guidelines state that an employer must hold a job open for women absent because of pregnancy according to the same criteria that jobs are held open for employees on leave for other nonoccupational disabilities.<sup>95</sup> The EEOC repeats this theme throughout the regulations. Consequently, the equal treatment theory stands on solid legislative and administrative grounds.

### 3. Judicial Support for Equal Treatment

Currently, the battleground for the equal treatment and equal opportunity theories is the courtroom. Since 1978, the courts have narrowed their approach to pregnancy discrimination,<sup>96</sup> relying heavily on the

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92. See *supra* notes 62-65 and accompanying text.

93. One EEOC guideline states that disabilities caused or contributed to by pregnancy shall be treated the same as medical disabilities with regard to such matters as leave, seniority, reinstatement and insurance. 29 C.F.R. § 1604.10(b) (1985). But see 29 C.F.R. § 1604.10(c) (1985) which deviates from the "same" treatment standard entrenched in other guidelines. It provides:

Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

94. See Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 (App. 1985). The interpretive guideline which states that a health insurance plan which currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, must provide extended benefits for other medical conditions on the same basis as for those pregnancy-related conditions. In *Kansas Ass'n of Commerce & Indus. v. EEOC*, 33 Fair Empl. Prac. Cas. (BNA) 588 (D. Kan. 1983), a district court specifically endorsed the guideline. The court found that a plan extending greater benefits to women than men violated Title VII's ban on sex discrimination. *Id.*

95. Question 9 states:

Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 (App. 1985).

96. See *infra* notes 108-37 for cases that apply the same treatment test to particular

PDA's same treatment standard.<sup>97</sup> Many courts utilize the equal treatment theory to determine the propriety of the standard<sup>98</sup> and its application to specific disability policies.<sup>99</sup>

The Supreme Court's pronouncements on the pregnancy discrimination issue further buttress the position of equal treatment theorists.<sup>100</sup> In *Newport News Shipbuilding and Dry Dock Co. vs. EEOC*,<sup>101</sup> the Supreme Court determined that an insurance plan that limited coverage for pregnancy-related expenses incurred by spouses of male employees violated Title VII by discriminating against male employees.<sup>102</sup>

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employer practices. This straight forward application of the test contrasts the detailed disparate treatment and impact analysis courts often applied to the same employment policy prior to the PDA. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Harris v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980).

97. 42 U.S.C. § 2000e(k). See *supra* note 5 for text.

98. See *infra* notes 104-09 and accompanying text.

99. See *infra* notes 110-37 and accompanying text.

100. Although the Supreme Court, since the passage of the PDA, has not ruled on a case in which an employer discriminated directly against a pregnant employee, the Court did address the propriety of the PDA in a case which struck down a policy discriminating against male employees. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

101. 462 U.S. 669 (1983). See Comment, *Interpretation of the Pregnancy Discrimination Act and the EEOC Guidelines: Conflicting Federal Responses and Analogous Confusion at the State Level*, 1 DET. C.L. REV. 77 (1984). The author analyzes the *Newport News* decision and tracks its progress from the lower courts. The author also examines the use of the BFOQ and business necessity defenses under the PDA.

102. 462 U.S. at 685. The Court stated that the issue was "whether petitioner has discriminated against its male employees with respect to their compensation, terms, conditions, or privileges of employment because of their sex within the meaning of § 703(a)(1) of Title VII." *Id.* at 675. The Court determined that the company's plan was unlawful because the protection it gave married male employees was less comprehensive than the protection it gave married female employees. *Id.* at 676. Specifically, the Court found that the company's plan violated 42 U.S.C. § 2000e-2(a). See *supra* note 12 for text. The Court noted that although the PDA makes clear that the language of 42 U.S.C. § 2000e-2(a) should be constructed to prohibit discrimination against female employees on the basis of pregnancy, it did not remove or limit Title VII's prohibition of discrimination on the basis of the employee's sex—male or female—already present in the employment discrimination statute. 462 U.S. at 675 n.11.

The Court discussed the legislative history of the PDA and noted that proponents of the legislation always intended to protect *all* individuals from sex discrimination in employment, including, but not limited to, pregnant workers. *Id.* at 681.

The Court went on to state that the company's practice was unlawful because it did not pass the test of Title VII that the Court had formulated in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). Under the test as expressed in *Manhart*, a policy must not treat a class of employees in a certain manner solely on the basis of gender. *Id.*

The Court required the employer to extend the same level of medical coverage for all conditions, including pregnancy, to spouses of employees of both sexes.<sup>103</sup> Consequently, equal treatment advocates can argue that the Supreme Court does not interpret the PDA as requiring greater benefits for females, but equal benefits for all employees.<sup>104</sup>

The judicial battle between the theories is highlighted in cases that determine the propriety of state legislation extending preferential treatment to pregnant employees. The inconsistent decisions amplify the debate because both sides claim judicial victory for their competing positions.<sup>105</sup> To support their theory, equal treatment proponents rely on cases such as a California district court's recent decision in *California Federal Savings and Loan Association v. Guerra*.<sup>106</sup> The court struck down a state law requiring employers to offer pregnant women

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103. 462 U.S. at 685. The Court stated, "[i]n short, Congress' rejection of the premises of *General Elec. Co. v. Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex." Therefore, because the Newport Company's plan mirrored G.E.'s plan, *see supra* notes 24-32, Newport News Dry Dock Co. was guilty of discrimination.

104. *Newport News* bolsters the equal treatment theory. The Court's discussion of the PDA's legislative history and its acceptance of the PDA's definition of sex discrimination and the same treatment standard lend credence to the theory. The Court's decision is significant because it determines that men can also suffer from pregnancy discrimination. Equality in treatment runs to both female and male employees. Nevertheless, those advocating equal opportunity may argue that the interpretation of the PDA is not yet a settled issue. In *Newport News*, the Court did not examine a policy that provided special pregnancy benefits to either male or female employees. The Court, however, noted that the cost of providing complete insurance coverage for dependents of male employees may exceed the cost of providing complete coverage for dependents of female employees. 462 U.S. at 685 n.26. The Court decided that this type of cost differential was not a defense under Title VII once discrimination was shown. *Id.* The Court's indirect approval of unequal treatment bolsters a special treatment theorist's argument. *See also* California Fed. Sav. & Loan v. Guerra, 758 F.2d 390 (9th Cir. 1985), *infra* notes 190-96 and accompanying text.

105. *See infra* notes 105-37 and accompanying text (cases applying the equal treatment theory); *infra* notes 189-212 and accompanying text (cases applying the equal opportunity theory).

106. 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), *rev'd*, 758 F.2d 390 (9th Cir. 1985). When Lillian Garland attempted to return to her job from maternity leave, she found her position filled. The California Department of Fair Employment and Housing told her that the bank had violated a state law that provided four months of unpaid pregnancy leave without loss of job. The bank's disability plan allowed the bank to terminate an employee on leave of absence if a similar position is not available when the employee returns to work. *Id.* at 565. The district court held that the California law was null and void due to its conflict with the mandate of the same treatment standard under the PDA. *Id.* at 568.

up to four months maternity leave and to ensure the women reinstatement upon return.<sup>107</sup> The court, agreeing with the employer,<sup>108</sup> found the law inconsistent with PDA's purposes of eliminating gender-based classifications and providing equal treatment to all employees.<sup>109</sup> The court rejected the suggestion that the statutes could co-exist and declared the California statute invalid.<sup>110</sup>

Courts determining the validity of specific benefit plans routinely hold that the employer must provide the "same" treatment for all non-occupational disabilities. The courts rely on the language and history of the PDA.<sup>111</sup> Many courts, focusing on the second clause of the

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107. California Government Code § 12945 provides in pertinent part:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

....  
(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . .

....  
(2) To take a leave to account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

CAL. GOV'T CODE § 12945 (West 1982).

108. The employer, California Federal, contended that the state law was preempted by Title VII because it conflicted with federal prohibitions against sex discrimination and the PDA. *Guerra*, 34 Fair Empl. Prac. Cas. (BNA) at 562.

109. *Id.* at 563.

110. *Id.* The Ninth Circuit Court of Appeals reversed the district court's decision in *California Federal Savings and Loan v. Guerra*, 758 F.2d 390 (9th Cir. 1985). See *infra* notes 190-96 and accompanying text for discussion of the Ninth Circuit's opinion.

111. See, e.g., *EEOC v. Southwestern Elec. Power Co.*, 591 F. Supp. 1128 (W.D. Ark. 1984) (employer did not violate the PDA by evaluating an employee's medical condition on an individual basis a reasonable time after the temporary disability began and requiring the employee to furnish proof of additional leave as needed; all disabilities were evaluated on this basis). Courts have addressed these additional questions: (1) when an employer may lawfully terminate an employee because of pregnancy (see, e.g., *Harvey v. Young Women's Christian Ass'n*, 533 F. Supp. 949 (D.N.C. 1982) (pregnant employee discharged even though she made out a prima facie case of pregnancy discrimination because employer articulated that the legitimate nondiscriminatory reason for the dismissal was the employee's influence on students as an unwed mother)); (2) when an employer must comply with the act (see, e.g., *EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566 (6th Cir. 1984) (when employer contributed to employees' relief association, he was associated closely enough with the fund to be held responsible for failure of the fund to provide pregnancy benefits as part of the disability benefits for the relief association)); and (3) whether an employer must provide for abortion-related disabilities (see, e.g., *National Conference of Catholic Bishops v. Smith*, 653 F.2d 535 (D.C. Cir. 1981) (the conference sought declaratory and injunctive relief

PDA,<sup>112</sup> require employers to modify policies unfavorable to women. In *EEOC v. Wooster Brush Co. Employees Relief Association*<sup>113</sup> the Sixth Circuit Court of Appeals held invalid a company-funded disability policy administered by an employees' association because it gave no financial benefits to employees on maternity leave.<sup>114</sup> The court summarily stated that the employer was liable because he violated the statutory duty imposed by the PDA.<sup>115</sup> In *Barone v. Hackett*,<sup>116</sup> the Rhode Island district court found that an employer did not violate the PDA by its failure to compensate pregnant women for the lower benefits they received under state funded programs.<sup>117</sup> The employer's only duty was to treat pregnant employees the same as others similarly situated with respect to the ability to work.<sup>118</sup>

Also shedding light on the courts' attitude toward pregnancy discrimination are the decisions involving dismissal policies and mandatory maternity leaves. Working from the premise that a woman's ability to perform her duties is the primary factor in allowing her to continue to work, the courts often find employers liable for dis-

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against enforcement of the PDA on grounds that it abridged their first amendment right to freedom of religion)).

112. 42 U.S.C. § 2000e(k); See *supra* note 5 for text.

113. 727 F.2d 566 (6th Cir. 1984). The court found that when the employer participated in the employees' relief association and took advantage of the benefits conferred upon its employees by membership in the association, the employer was responsible for discriminating against women. *Id.* at 573-74.

114. *Id.* at 579. The plan provided financial assistance to all disabled employees, except those disabled by pregnancy. *Id.* at 570.

115. *Id.* at 573. The court noted that the employer participated in, and benefited from, the plan in such a way that it had not disassociated itself from the discriminatory practice. *Id.* at 573-74. The Court found that "the employer's statutory duty is plain: the employer must not discriminate on account of sex in dispensing disability benefits." *Id.* at 573.

116. 28 Fair Empl. Prac. Cas. (BNA) 1765 (D.R.I. 1982).

117. *Id.* at 1769. State law required employers to make contributions to a state temporary disability insurance fund. The state paid lower benefits for pregnancy-related disabilities than for other temporary disabilities. The pregnant employee claimed that the employer must pay her additional benefits to compensate for the discrepancy in state pay so that she, like her temporarily disabled coworker, would receive equal benefits. *Id.* at 1766-68. The court determined that although the PDA requires employers to treat pregnant employees the same as other workers, the Act does not require employers to ensure that pregnant employees receive the same level of benefits as their coworkers. *Id.* at 1769-72.

118. *Id.* at 1770. The PDA "does not require employers to treat pregnant women more favorably in order to compensate for discrimination caused by others." *Id.*

missing pregnant women for no plausible reason.<sup>119</sup> In *Somers v. Aldine Independent School District*,<sup>120</sup> a Texas district court found that the school district violated the PDA when it denied a pregnant teacher leave with pay and ultimately fired her because she was pregnant.<sup>121</sup>

Employees, however, are not always successful in their attempts to retain jobs on pregnancy discrimination grounds. As evidenced by the decision in *Connors v. University of Tennessee Press*,<sup>122</sup> an employee may establish a prima facie case of discrimination under the PDA, but have the employer rebut with a legitimate, nondiscriminatory reason

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119. Many courts deciding employee challenges to benefit and dismissal policies on the grounds of pregnancy discrimination apply the test set forth in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Court outlined the test as follows:

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason . . . . [If the defendant is successful], the plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.

*Id.* at 254-56. See *Beck v. Quicktrip Corp.*, 708 F.2d 532 (10th Cir. 1983) (when an employer dismissed a pregnant employee on grounds of insubordination and failure to follow company policy, the employee showed the employer's reasons were pretextual; she had followed procedures, had received no warning of possible dismissal, and had knowledge that the employer considered her pregnancy a potential employment problem); *Iodice v. Southeastern Packing & Gaskets, Inc.*, 572 F. Supp. 1370 (N.D. Ga. 1983) (the employer successfully rebutted the employee's prima facie claim of pregnancy discrimination with proof that she did not satisfactorily complete her work details, even though the dismissal came shortly after the employer learned of the pregnancy and signed a letter stating he felt she could no longer continue in her condition).

120. 464 F. Supp. 900 (S.D. Tex. 1979).

121. *Id.* at 902. The school board dismissed the pregnant teacher because she refused to comply with the maternity policy requiring pregnant employees either to take a mandatory leave of absence or face dismissal after the third month of pregnancy. *Id.* The board did not require male employees to take mandatory unpaid sick leave or face termination. *Id.* at 903. The court held that the policy discriminated against female teachers on the basis of pregnancy, and therefore violated the PDA. *Id.*

122. 558 F. Supp. 38 (E.D. Tenn. 1982). The employee alleged that the employer forced her to resign after she requested an additional leave of absence without pay for a pregnancy-related illness. *Id.* at 39. The employer, however, successfully showed that the employee's short tenure, poor work record and past absence record were legitimate, nondiscriminatory reasons for the dismissal. *Id.* at 41. The court found that the employer would have treated her no differently if she suffered from another disability. *Id.*

for denying the benefit.<sup>123</sup> Courts have found poor performance,<sup>124</sup> need to fill the position,<sup>125</sup> excessive absences<sup>126</sup> and failure to uphold the business' philosophy<sup>127</sup> justifiable reasons for termination.

Two of the more recent cases addressing dismissal policies consider other factors in addition to the ability to perform. Reaching opposite conclusions regarding the propriety of the respective policies, both cases adhere to a form of the equal treatment theory. In *Levin v. Delta Air Lines, Inc.*,<sup>128</sup> the Fifth Circuit Court of Appeals held that Delta did not violate the PDA when it removed flight attendants from duty upon learning of their pregnancies.<sup>129</sup> The court rejected the argument of unfavorable treatment, agreeing with the employer that the policy was necessary to ensure passenger safety.<sup>130</sup> The airline did not discriminate because it removed from flight duty *all* persons with disabili-

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123. *Id.* at 40.

124. *See, e.g.,* Reeves v. Brand-Name Fashion Outlet, 532 F. Supp. 32 (W.D. Tenn. 1982) (employee's unsatisfactory work habits and failure to demonstrate enthusiasm for the job justified the demotion).

125. *Connors*, 558 F. Supp. at 40.

126. *Id.*

127. *Harvey*, 533 F. Supp. at 955-56 (an employer's choice to dismiss an unwed pregnant employee who counseled youth groups was not discriminatory because the employee presented to the underprivileged young people a model which ran contrary to the employer's philosophy and which was counterproductive to the job's goals).

128. 730 F.2d 994 (5th Cir. 1984).

129. *Id.* at 1002. The Ninth Circuit also addressed mandatory maternity leave of stewardesses in *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), *reh'g denied* (1981). The court found no violation of the PDA under a policy that removed stewardesses from duty upon discovery of pregnancy. The court recognized that the PDA made discrimination based on pregnancy unlawful *per se*, but under the BFOQ analysis they found that nonpregnancy was a bona fide occupational qualification because pregnancy adversely affected passenger safety. *Id.* at 677.

For an in-depth review of *Harriss*, see Recent Decision, 20 DUQ. L. REV. 123 (1981).

130. *Levin*, 730 F.2d at 997. To meet a Title VII challenge, a discriminatory policy must relate to the essence of the business. Because safety is the essence of an airline's business, Delta had to show that a pregnancy policy substantially reduces the risks attending air travel in order to overcome a Title VII challenge. *Id.* The court will uphold a facially discriminatory policy only if the employer shows that the policy's contribution to safety is more than minimal. *Id.* The court found that Delta met the first prong of the test, for it showed that the leave policy greatly reduced the risk of severe injury to passengers. *Id.* Pregnancy impairs the ability to perform routine and emergency safety duties. The airline also satisfied the second prong of the test, which required them to show a factual basis for the belief that all, or substantially all, pregnant flight attendants would be unable to perform the duties safely. *Id.* at 998. Alternatively, the airline could show that it was impossible to determine individually each attendant's capabilities. *Id.* Inability to predict the effects pregnancy has on particular women makes it



ties likely to jeopardize passenger safety.<sup>131</sup>

In another case focusing on factors other than pregnancy, the Court of Appeals for the Eleventh Circuit held that an employer could not dismiss a pregnant employee merely because the work exposed her to substances potentially harmful to the fetus.<sup>132</sup> In *Hayes v. Shelby Memorial Hospital*,<sup>133</sup> the court found that the hospital violated the PDA when it dismissed a pregnant X-ray technicians.<sup>134</sup> The court noted that the hospital intended to apply the fetal health policy only to pregnant x-ray technicians.<sup>135</sup> The court outlined the test for fetal protection policies that only apply to one sex.<sup>136</sup> "The policy violates Title VII unless the employer shows (1) that a substantial risk of harm exists; and (2) that the risk is borne by members of one sex; and (3) the employee fails to show that there are acceptable alternative policies which would have a lesser impact on the affected sex."<sup>137</sup> The court held that the hospital failed the test and was, therefore, liable.<sup>138</sup>

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difficult for employers to deal with pregnancy on an individualized basis. *Id.* Non-pregnancy, therefore, is a bona fide occupational qualification for flight attendants. *Id.*

131. *Id.* at 998-99. Stewardesses argued that although Delta cited safety as a justification for the pregnancy policy, the airline did not make comparable efforts to remove from flight duty attendants who suffered other medical conditions that might be similarly incapacitating, such as epilepsy and diabetes. *Id.* at 998. Therefore, they argued, the safety considerations were pretextual and Delta acted discriminatorily toward them. *Id.* The court rejected this argument. It reasoned that a plaintiff could not use pretext to overcome a BFOQ. *Id.* Even if that were a proper rebuttal, the plaintiffs could not succeed because the company had not discriminated; the airline did restrict attendants with debilitating diseases from flight duty. *Id.* at 999.

132. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984). Several commentators have addressed the relationship between employer fetal-protection policies and the PDA. See generally Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981) (the author urges equal treatment for all women under the PDA and other policies that keep women on the job despite potential hazards). See also Note, *Fetal Vulnerability and the 1978 Pregnancy Amendments—Wright v. Olin Corp.*, 19 WAKE FOREST L. REV. 905 (1983). The author outlines the merits of another decision in which the court held unlawful a policy excluding women from certain jobs because of fetal exposure to toxic substances. See *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

133. 726 F.2d 1543 (11th Cir. 1984).

134. *Id.* at 1554.

135. *Id.* at 1550.

136. *Id.* at 1554.

137. *Id.*

138. *Id.* See also *Fancher v. Nimmo*, 549 F. Supp. 1324 (E.D. Ark. 1982) (employer's failure to reinstate employee as an X-ray technician, after the hospital required

As this line of cases suggests, courts applying the equal treatment standard consider pregnancy-related disabilities comparable to other physical conditions that affect the ability to work.<sup>139</sup> Thus, the equal treatment theorists rely not only on the PDA's statutory language and legislative history, but also on judicial interpretations of the Act.<sup>140</sup> Nevertheless, the solid foundation upon which the equal treatment standard rests does not foreclose the possibility that courts might consider alternative solutions to pregnancy discrimination that are also plausible.<sup>141</sup>

## B. *Equal Opportunity Theory*

### 1. The Theory

The equal opportunity theory embodies the philosophy that equal treatment breeds a discriminatory result, while preferential treatment fosters an equal one.<sup>142</sup> A uniformly applied policy denies equal employment opportunity because the policy has a disparate impact on pregnant workers.<sup>143</sup> If employers provide inadequate disability bene-

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her to leave that position because of pregnancy and a desire to protect the fetus, is a discriminatory policy under the PDA).

139. See *supra* notes 95-137 and accompanying text. The exception to this rule arises when the interests of third parties, such as passengers, are jeopardized by the condition of the pregnant employee. See, e.g., *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984).

140. See *supra* 95-137 and accompanying text (cases supporting the equal treatment view).

141. See *infra* notes 144-63 and accompanying text (discussing the equal opportunity model). Professor Herma Hill Kay argues that continued adherence to the equal treatment model founders on the fact that men and women have sexual reproductive differences. She suggests that scholars "direct our energies to devising ways to accommodate and neutralize the impact of those differences on the lives of women and men." Kay, *supra* note 75, at 88.

142. See A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* §§ 38.00-.07 (1985). The authors detail the problems of pregnant employees, and advocate an equal opportunity solution. See also Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983). The author labels those who advocate unequal treatment of pregnant women to help them reach equal opportunity as "pluralists." *Id.* at 707. Herma Hill Kay calls this equal opportunity model a pluralist view because the proponents of this approach acknowledge that the capacity to become pregnant is one of the few immutable differences that distinguish women from men and seek to build a model of equality accommodating women's fertility and neutralizing its barrier to personal achievement. See Kay, *supra* note 75, at 40.

143. The disparate impact theory involves situations in which an employee concedes that a policy is neutral, but claims it disproportionately affects a protected class. To establish a *prima facie* case, the employee does not have to show intent to discrimi-

fits, the policy equally harms both male and female employees with respect to nongender related conditions. This policy, however, places women at an additional disadvantage, because only they can become pregnant.<sup>144</sup>

The equal opportunity theory turns primarily on the sexual reproductive differences between men and women.<sup>145</sup> Pregnancy forces a large number of female laborers to take some period of leave and incur medical expenses. The problems multiply when employers fail to adequately compensate women for the inconveniences of pregnancy. Employers rarely provide adequate disability benefits for those women segregated in a group of female-oriented jobs in the secondary labor market.<sup>146</sup> This failure leaves these marginal workers at a distinct disadvantage compared to male coworkers in comparable jobs.<sup>147</sup> Women fall behind in the race for equal opportunity because men never incur job losses, wage reductions or medical expenses for pregnancy-related disabilities.

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nate, but only that the policy has a disparate impact. The employer can then argue the business necessity defense. Courts require that the employer show the policy has a "demonstrable relationship to successful performance on the job" or that it "effectively carries out a business purpose." See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971). If the employer is successful in establishing business necessity, the employee may then attempt to show that there are "acceptable alternative policies or practices that would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Id.* at 798. The Supreme Court first recognized this approach in *Griggs*, in which the Court stated that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." *Id.* at 431. See also *Dothard v. Rawlinson*, 433 U.S. 321 (1977). For an overview of the business necessity defense, see *Williams*, *supra* note 131, at 687.

144. See A. LARSON, *supra* note 141, at § 38.22.

145. See *Krieger & Cooney*, *supra* note 10, at 542. The authors note that a strict equal treatment view fails to focus on the sex difference that pregnancy entails, on the relative positions of men and women in society and on the goal of assuring equality of opportunity within a heterogeneous society.

146. *Id.* at 520.

147. Larson points out:

Clearly, if an employer says, "All pregnant employees will be fired," there is sex differentiation. It is really no different in effect to say, "No maternity leaves will be granted." . . . [S]ome leave accompanying childbirth is an accepted modern necessity, and a policy denying it, with discharge as the alternative, is tantamount to a policy of outright discharge for pregnancy . . . it is sex differentiation *not* to offer to women a benefit denied to men—maternity leave. The reason is that this "inequality" is necessary to provide substantial equality of employment opportunity.

A. LARSON, *supra* note 141, § 38.22, at 8-31, 32 (emphasis in original).

Those advancing the equal opportunity theory argue that pregnancy benefit policies must account for the immutable sexual differences that distinguish women from men by giving women preferential treatment.<sup>148</sup> Like the equal treatment theory, the equal opportunity approach requires employers to remedy disparate treatment.<sup>149</sup> The theory goes a step further, however, because it requires employers to extend pregnancy disability benefits, although they offer no benefits for similar disabilities, in order to remedy disparate impact.<sup>150</sup> The PDA is inadequate to treat disparate impact in situations when the employer supplies inadequate benefits. Even though all employees are treated the same, no man faces the same expenses or risks dismissal for failure to work as a pregnant female worker does.<sup>151</sup>

The equal opportunity theorists advocate affirmative legislation.<sup>152</sup> Some proponents argue that the PDA does not bar pregnancy-positive legislation because Title VII does not forbid such legislation.<sup>153</sup> They

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148. Larson notes:

We have here an example of the kind of case in which an "equality" issue cannot be disposed of by decreeing that the sexes shall be treated exactly alike. Instead, we must build upon a quite different premise: when the two sexes are *dissimilar* in that one sex exclusively possesses a trait which the other, without exception, does not possess, and when that trait has a bearing upon employability, it is a differentiation based on sex to treat the two sexes *similarly* as to that trait.

A. LARSON, *supra* note 141, § 38.22, at 8-31 (emphasis in original).

149. See *supra* note 72 and accompanying text.

150. See Note, *supra* note 141, at 707. "[A] pluralist approach, in practice, requires disability benefits for pregnancy-related disabilities when they are offered for non-pregnancy-related disabilities. It also requires, however, that benefits for pregnancy-related disabilities be provided even where no benefits are offered for nonpregnancy-related disabilities." *Id.*

151. See *supra* note 146. See also Note, *supra* note 141, at 726. "[A]n employer who adopts a sex-blind no-leave-of-absence policy discriminates against women by failing to recognize and compensate for the different reproductive roles of the sexes."

152. Some states have already taken steps to accommodate for this disparate impact. For example, Connecticut law provides:

(a) It shall be a discriminatory practice in violation of this section . . .

(7) for an employer, by himself or his agent:

(A) to terminate a woman's employment because of her pregnancy;

(B) to refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy . . .

CONN. GEN. STAT. § 46a-60 (1982).

153. See Note, *supra* note 141, at 690. Title VII preempts state employment legislation in situations in which the state law requires an act unlawful under Title VII. Equal opportunity advocates claim that Title VII does not forbid state pregnancy-positive legislation because both the PDA and special pregnancy legislation work to prohibit sex discrimination on the basis of pregnancy. The Supreme Court, in *Shaw v. Delta Air-*

claim that the PDA does not prohibit, even if it does not require, practices designed to accommodate pregnant workers with no counterpart for nonpregnant workers.<sup>154</sup> On the contrary, special legislation furthers the purpose of the PDA to prohibit sex discrimination on the basis of pregnancy.<sup>155</sup> Preemption does not bar protective state legislation. Given courts' traditional deference to state police powers,<sup>156</sup> preemption is inappropriate absent an unambiguous congressional mandate.<sup>157</sup> Other proponents, however, argue that the PDA does preempt special legislation. Therefore, to enable women to attain equal opportunity, Congress should reformulate the statute to require special treatment.<sup>158</sup>

In response to equal treatment advocates' denouncement of preferential laws, the equal opportunity theorists refute the idea that special laws further dangerous stereotypes.<sup>159</sup> First, the laws are not protective policies because they restrict neither job availability nor working conditions.<sup>160</sup> Rather, the statutes assure women that they will retain

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lines, Inc., 463 U.S. 85 (1983), held that Title VII is neutral on the subject of all employment practices it does not prohibit. *Id.* at 103. Therefore, special legislation and the PDA do not conflict because Congress specifically did not forbid special legislation to redress disparate impact.

154. See Kay, *supra* note 75, at 82.

155. Congress repeatedly declared this a major goal of the PDA. See, e.g., H.R. CONF. REP. NO. 1786, *supra* note 40, at 4765. See also *supra* notes 151-53 and accompanying text.

156. "The concept of police power is defined to include the power to enact legislation for the promotion of public health, safety, morals, peace, and welfare." See generally VAN ALSTYNE, KARST, GERARD, CONSTITUTIONAL LAW 71 (1983). This definition brings the issue of pregnancy discrimination clearly within the purview of state police power.

157. In preemption analysis, courts start with the assumption that the historic police power of the states is not superceded by a federal act unless that was the clear and manifest purpose of Congress. *Florida Avocado & Lime Growers v. Paul*, 373 U.S. 132 (1963). There is no such clear and manifest purpose in the legislative history of the PDA indicating that Congress intended to abolish totally all statutes that treat pregnancy preferentially.

158. See Krieger & Cooney, *supra* note 10, at 514.

159. *Id.* at 532. Affirmative legislation is not harmful because no man will ever need these policies and no pregnant woman is forced to take part in the benefits. It merely puts a pregnant employee on equal footing with men and permits her to compete equally in the labor market. It does not provide women an additional benefit denied to men; rather, it merely prevents women from suffering an additional burden no man bears. *Id.* at 533.

160. Cf. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) (protective legislation that denies women entire categories of jobs is unlawful).

their jobs when hampered with pregnancy-related disabilities.<sup>161</sup> Second, Title VII does not invalidate this type of protective legislation.<sup>162</sup> Unlike other statutes, the pregnancy-positive legislation will not cause over-and under-inclusive classifications because such legislation does not require different treatment of women and men based on stereotypic assumptions about the sexes.<sup>163</sup> Special pregnancy laws merely account for biological differences; the laws place men and women on equal footing, thus permitting women to compete successfully in the labor market.<sup>164</sup>

## 2. Legislative and Administrative Bases

The equal opportunity theory finds support in the statutory language. The PDA is a definitional statute, and when read in the context of Title VII's substantive provisions, the Act suggests that Congress intended to provide equal opportunities to pregnant employees and to protect against disparate impact. Although the PDA mandates equal treatment for pregnant employees based on their ability to work, it also defines "because of sex" or "on the basis of sex" as including "because of or on the basis of pregnancy."<sup>165</sup> Therefore, when one applies the PDA's definition to a substantive provision of Title VII such as section 2000(e)-2, which declares it unlawful for an employer to "discharge any individual . . . because of such individual's . . . sex . . .,"<sup>166</sup> section 2000(e)-2 appears to prohibit an employer from discharging an employee because she is pregnant, regardless of whether an employer would discharge a similarly disabled, but nonpregnant, employee.<sup>167</sup>

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161. See Krieger & Cooney, *supra* note 10, at 531.

162. For an example of beneficial legislation that Title VII does prohibit, see *Homemakers, Inc. v. Division on Indus. Welfare*, 509 F.2d 20 (9th Cir. 1974) (invalidating a state law that required employers to pay overtime to female, but not male, employees).

163. See Krieger & Cooney, *supra* note 10, at 532-33.

164. See generally Krieger & Cooney, *supra* note 10.

165. For pertinent text of the PDA, see *supra* note 5.

166. 42 U.S.C. § 2000e-2(a) (1981).

167. Section 2000e, which contains the PDA, is a definitional section. One can reasonably interpret this section as sanctioning special treatment policies. The first clause of section 2000e(k) defines "because of sex" as "because of pregnancy." 42 U.S.C. § 2000e(k). See *supra* notes 39-59 and accompanying text (Congress intended to amend § 2000e to include a definition of discrimination on the basis of pregnancy). Placing the words "because of pregnancy" into certain substantive provisions of the equal employment opportunities section of Title VII, 42 U.S.C. § 2000e-17 (1981), indicates that employers must provide preferential treatment to pregnant employees. For example, 42 U.S.C. § 2000e-2(a) (1981) reads:

Consequently, equal opportunity theorists may argue that the PDA's statutory language permits special treatment of pregnant women.<sup>168</sup>

Legislative history also supports the equal opportunity theory. Congress enacted the PDA to clarify the definition of sex discrimination to guarantee working women protection against all forms of employment discrimination.<sup>169</sup> Congress did not intend to diminish the protection available under Title VII, which included protection against disparate impact.<sup>170</sup> Congress specifically referred to equal opportunity. The House report notes that "the elimination of discrimination based on

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It shall be an unlawful employment practice . . . (1) to hire or to discharge . . . or otherwise to discriminate against any individual . . . because of such individual's . . . sex . . . or (2) to limit . . . his employees . . . in any way which would deprive . . . any individual of employment opportunities . . . because of . . . sex . . . .

*Id.* Substituting "because of pregnancy" for "because of sex," one author notes that the law appears to flatly prohibit an employer from discharging an employee because she is pregnant even if he would discharge similarly disabled nonpregnant employees. *See supra* note 12, at 635. *See also* Opening Brief of State Appellants at 17, California Federal Savings & Loan v. Guerra, 34 Fair Empl. Prac. Cas. 563 (C.D. Cal. 1984) (noting the effects of this substitution). The two clauses in the PDA make the statute very unclear. Although definitional in nature, the second clause seems to be a substantive provision. *See supra* note 5. Consequently, no clear interpretation emerges. *See also* Note, *supra* Note 141, at 694-99 (outlining the discrepancies in the PDA's language).

168. The opponents of specialist legislation argue that the second clause is a substantive provision that limits protection for pregnant employees to the prohibition of disparate treatment. *See* Note, *supra* note 12, at 625-37 (outlining the conflict between the definitional and substantive portions of the PDA). *See also* Note, *supra* note 141, at 694. In this Note, the author notes that the two clauses of the PDA support different answers to the question of what is required of employers who offer no disability benefits. One reading of the PDA suggests that the second clause gives substance to the first. *Id.* Some courts and commentators endorse this reading. *See* EEOC v. Lockheed Missiles & Space Co., 680 F.2d 12343, 1245 (9th Cir. 1982). *See also* Barkett, *Pregnancy Discrimination—Purpose, Effect, and* Nashville Gas Co. v. Satty, 16 J. FAM. L. 401, 482 n.306 (1978). An alternative interpretation focuses on the first clause of the Act and reads it in conjunction with the other Title VII provisions. *See* Note, *supra* note 141, at 695. Consequently, courts read "because of or on the basis of pregnancy" as an absolute ban on pregnancy discrimination, no matter how employers treat other disabilities. *Id.*

169. *See* H.R. REP. NO. 948, *supra* note 40, at 3. Legislators intended the PDA to incorporate discrimination on the basis of pregnancy into the definition of sex discrimination and to ensure working women protection against all forms of sex discrimination. *Id.*

170. Senator Javits stated:

This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women

pregnancy . . . will go a long way toward providing equal employment opportunities for women, the goal of Title VII.”<sup>171</sup> This statement provides evidence that Congress intended to formulate a law that creates equality in result.<sup>172</sup>

Beyond direct references to equal opportunity, there is additional evidence that Congress recognized pregnancy’s disparate impact on employment opportunities. Legislators repeatedly referred to statistics evidencing the hardships that pregnant workers often face.<sup>173</sup> Congress implicitly acknowledged the adverse physical, emotional and financial impact pregnancy has on both the worker and her family.<sup>174</sup> Unlike men, women encounter pregnancy disabilities in addition to disabilities comparable to those shared by nonpregnant coworkers.<sup>175</sup>

Additionally, Congress approved the increased costs the PDA would impose on employers providing disability benefits.<sup>176</sup> Congressmen

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employees to the point where it was last year, before the Supreme Court’s decision in [*Gilbert*] . . .

123 CONG. REC. 29,387 (1977).

171. H.R. REP. NO. 948, *supra* note 40, at 4755.

172. See Note, *supra* note 141, at 726. (“The PDA calls for . . . equality in result.”).

173. Congress noted that 80% of all women become pregnant during their working lives; 40% of these women are employed during their pregnancy; 40% of all mothers with children under six are employed; the average leave of absence for pregnancy is six to eight weeks; 60% of the women return to work; and 70% of the women who work do so out of need to support their families because they are married to husbands who earn less than \$7000 or because they are single. See 123 CONG. REC. 29,385-88, 29,641-64 (1977).

174. Congress noted that a large number of working women are heads of households and that the income in these homes is less than households with male heads. 123 CONG. REC. 29,386-87 (1977). Discrimination based on pregnancy not only singles out and discriminates against women as women, “it also discriminates against the childbearing process.” *Id.* at 29,661 (remarks of Sen. Biden).

175. See *supra* notes 59-60, 168-71 and accompanying text.

176. By approving increased employer expenditures to cover all female disabilities, sums greater than those required to cover all male disabilities, Congress implied that it endorsed policies giving more to pregnant women to place them at an equal opportunity level as their coworkers. The cost estimate for employers implementing pregnancy benefit policies ranged from \$130 million to \$1.7 billion. S. REP. NO. 331, *supra* note 40, at 9; CONG. REC. 29,660 (1977). The House and Senate Committees found the Department of Labor’s \$191.5 million estimate to be reasonable. This represented a 3.5% increase in total contributions to temporary disability plans. H.R. REP. NO. 948, *supra* note 40, at 9-10; S. REP. NO. 331, *supra* note 40, at 10-11. See also Note, *supra* note 12, at 627 n.133 (summarizing the cost estimates the House and Senate Committees reviewed). Some who opposed the bill referred to the cost with hope to defeat the plan. Other legislators believed the issue should be left to collective bargaining. 123 CONG. REC. 29,659 (remarks of Sen. Helms).



characterized higher costs involved in policies including pregnancy benefits as a necessary element of the equalization process.<sup>177</sup> Employers do not discriminate when they provide greater benefits per dollar to women than men.<sup>178</sup>

Congress also cited special state pregnancy laws without giving an indication that they intended to override these statutes.<sup>179</sup> The House Report noted that many states already required employers to provide pregnancy benefits.<sup>180</sup> One representative stated that states have authority to require more than federal law so long as they do not conflict with federal law.<sup>181</sup> If Congress intended to preempt state laws, it could have expressly forbidden them or not have cited them so favorably.<sup>182</sup>

The EEOC also lends credence to the equal opportunity theory.<sup>183</sup>

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177. H.R. REP. NO. 948, *supra* note 40, at 4757. Congress noted that employer costs would increase for disability and health insurance. *Id.* One estimate was that the employer would incur an additional cost of \$18.84 per employee. 123 CONG. REC. 29,650 (1977).

178. By requiring the inclusion of pregnancy disability benefits in employee disability programs on the same basis as other disabilities, Congress acknowledged that it was also requiring employers to spend more per female employee than per male. Congress justified the different expenditures as compensation for the unequal social taxes that pregnancy imposes on women. Thus, under the PDA, men and women are accorded different treatment in order to insure equality in the result—a pluralist conception of sexual equality. See Note, *supra* note 141, at 710.

179. The House report includes the finding that “the following six states, as well as the District of Columbia, specially include pregnancy in their Fair Employment Practices Law: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana.” H.R. REP. NO. 948, *supra* note 40, at 4749, 4759.

180. Both Montana and Connecticut require employers to provide women employees with reasonable pregnancy disability leave and reinstatement. See Montana Maternity Leave Act, MONT. CODE ANN. § 49-2-310 (1984) and Connecticut Human Rights and Opportunities Act, CONN. GEN. STAT. § 46a-60 (1983).

181. See 124 CONG. REC. 6864 (remarks of Rep. Sarasin).

182. See H.R. REP. NO. 948, *supra* note 40, at 4759. The idea of singling out a certain characteristic for special treatment is not unusual. Congress has done this on several occasions. For example, Congress enacted the Rehabilitation Act, 29 U.S.C. § 794 (1982), to integrate handicapped people into the workforce. The Act provides special services to give the handicapped an opportunity to participate in the job market. The law mandates different treatment of the handicapped in order to redress the initial inequalities between otherwise similarly situated people. The PDA states that discrimination because of pregnancy violates Title VII. Thus, the PDA could be interpreted to require different treatment as a means to compensate for sex-based inequalities between otherwise similarly situated people. Note, *supra* note 141, at 718-19.

183. See 29 C.F.R. § 1604.10 (1985). For text of the guidelines, see *supra* notes 60-62.

The EEOC reissued guidelines on pregnancy related employment policies after the PDA's enactment.<sup>184</sup> Neither subsection (a) nor (c) incorporates the PDA's principle that employers treat disabled pregnant and nonpregnant workers the same.<sup>185</sup> Subsection (c) states that an employer who terminates a pregnant employee under an employment policy that provides no leave, or insufficient leave, violates the Act unless business necessity justifies the decision.<sup>186</sup> Consequently, the EEOC guidelines give pregnancy-disabled employees more job security than those unable to work because of comparable disabilities.<sup>187</sup> Additionally, the EEOC determined that it is not a defense to a charge of sex discrimination that the cost of benefits is greater with respect to one sex than the other.<sup>188</sup> Monetary outlays by employers who provide comprehensive medical coverage would be greater for women than men because of inclusion of pregnancy benefits. These regulations indicate that the EEOC intended to remedy disparate impact, thus providing pregnant women with enhanced equal employment opportunities.<sup>189</sup>

### 3. Judicial Support for Equal Opportunity

A few courts that have addressed pregnancy discrimination ac-

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184. 29 C.F.R. § 1604.10 (1985). The EEOC originally issued the guidelines in 1972 and reissued them with only minor modifications in 1979. 29 C.F.R. § 1604.10 (1979).

185. 29 C.F.R. 1604.10(a), (c) (1985). *See Note, supra* note 12, at 635.

186. 29 C.F.R. § 1604.10(c) (1985).

187. *Id.*

188. 29 C.F.R. § 1604.9(e) (1985).

189. Federal enforcement agencies have interpreted other federal laws forbidding employment discrimination to require employers to provide maternity leave whether or not they provide leave to other employees. *See* 20 U.S.C. § 1681 (1981) (prohibits sex discrimination in employment in education programs). Title IX, for example, is designed to eliminate discrimination on the basis of sex in activities receiving federal financial assistance. The EEOC issued guidelines pursuant to Title IX which provide that a recipient shall treat pregnancy the same as other temporary disabilities with respect to any medical plan it participates in; however:

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

7 C.F.R. § 15a.40(b)(5) (1985).

knowledge the equal opportunity theory. The decisions indicate a trend toward approval of special treatment policies despite the PDA's arguably restrictive language.<sup>190</sup>

Recently, the Ninth Circuit Court of Appeals took a prominent stand on equal opportunity grounds and reversed the California district court's decision in *Guerra*.<sup>191</sup> The appellate court upheld a California statute that extends mandatory pregnancy disability leave to pregnant employees.<sup>192</sup> The appellate court determined that the PDA did not preempt the California statute.<sup>193</sup> According to the court, states can require employers to extend extra benefits to pregnant employees be-

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190. See *infra* notes 190-212 and accompanying text. Some believe that *Newport News*, 462 U.S. 669 (1983), is not a bar to preferential treatment. See Reply Brief of State Appellants at 16-17, *California Fed. Sav. & Loan v. Guerra*, 34 Fair Empl. Prac. Cas. (C.D. Cal. 1984); Brief of Amici Curiae in Support of Appellants, at 22, *California Fed. Sav. & Loan v. Guerra*, 34 Fair Empl. Prac. Cas. (D.C. Cal. 1984); see also *supra* note 105.

191. *California Federal Savings and Loan Ass'n v. Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), *rev'd*, 758 F.2d 390 (9th Cir. 1985).

192. *Id.* at 396. See *supra* note 106 for text of the California statute. See also *supra* notes 104-08 and accompanying text (discussing the district court's opinion based on the equal treatment theory). The Ninth Circuit found invalid the district court's conclusion that the California statute discriminates against men on the basis of pregnancy. The Ninth Circuit relied heavily on *Newport News*, 462 U.S. 669 (1983). The appellate court observed that the district court misread the Supreme Court's opinion in formulating the rule that employers may disregard a state statutory obligation to provide pregnancy disability leave. 758 F.2d at 393. According to the Ninth Circuit, the Supreme Court "measured equivalence of benefits by the comprehensiveness of their coverage of the disabilities to which each sex is subject, while Cal Fed seeks to measure equality of benefits by the sameness of coverage despite the difference of needs." *Id.* According to the Ninth Circuit, the Supreme Court's *Newport News* decision does not prohibit statutes giving preferential treatment to pregnant employees. *Id.* "*Newport News* not only does not prohibit section 12945(b)(2), it provides a framework for harmonizing the California statute and the PDA." *Id.*

193. *Id.* at 394. The court narrowed its inquiry to the question of whether Title VII preempts the California statute. The court concluded that Title VII does not prevent states from extending nondiscrimination laws to areas not covered by Title VII. *Id.* at 394 (citing *Shaw v. Delta Airlines*, 103 S. Ct. 2890, 2903 (1983)). In addition, the court quoted Title VII's preemption provisions, 42 U.S.C. §§ 2000e-7, 2000h-4, to substantiate its position that Title VII does not invalidate state antidiscrimination laws unless they are inconsistent with Title VII. 758 F.2d at 394. The court found that the California statute is not inconsistent with Title VII's PDA. *Id.* at 396. The Ninth Circuit refused to decide whether Title VII compels employers to grant reasonable pregnancy leave to protect women from disparate impact of facially neutral, but inadequate, disability leave policies. *Id.* at 394. The court also did not decide whether some set of facts might show that the statute harms a woman's quest for employment, thus rendering § 12945(b)(2) invalid. *Id.* at 394. Because § 12945(b)(2) deals with pregnancy, the court pointed out that this decision does not affect the lawfulness of statutes that classify

cause the PDA provides "a floor beneath which benefits may not drop—not a ceiling above which they may not rise."<sup>194</sup> A pregnancy statute or employment policy, however, must "further Title VII's prophylactic purpose of achieving equality of employment opportunities."<sup>195</sup> The proper measure of equality compares coverage to actual need, not coverage to hypothetical need.<sup>196</sup> In conclusion, the Ninth Circuit stated that pregnancy disability leave is a "means to the goal of equal employment opportunity."<sup>197</sup>

Two other courts, ruling on the validity of a Montana pregnancy statute, further extolled the merits of the equal opportunity theory. In direct conflict with the California federal district court's decision in *Guerra*,<sup>198</sup> the Montana district court upheld special treatment legislation. In *Miller-Wohl Co. v. Commissioner of Labor and Industry*,<sup>199</sup> the federal district court upheld the Montana Maternity Leave Act (MMLA),<sup>200</sup> which prevented employers from dismissing women be-

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on the basis of sex-linked characteristics that are more stereotypical than biological. *Id.* at 395.

194. *Id.* at 396. The court reached this conclusion on the basis of several factors. First, Congress enacted the PDA to change the result of *Gilbert* and its logic that pregnancy discrimination is not sex discrimination. *Id.* at 395. Second, Congress sanctioned the expenditure of more dollars on medical coverage for female employees than for male employees in order to render equally comprehensive health benefits. *Id.* Finally, the court reasoned that the PDA does not demand that state laws be blind to pregnancy, for Congress adopted the *Gilbert* dissent that takes pregnancy into account. *Id.* at 395.

195. *Id.* at 396 (quoting EEOC v. Pugen Sound Log Scaling & Grading Co., 752 F.2d 1389, 1392 (9th Cir. 1985)).

196. *Id.* at 396.

197. *Id.* The court noted that it was not the first to announce that the goal of Title VII is equality of opportunity rather than sameness of treatment, for the Supreme Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), set precedent for the finding. 758 F.2d at 396 n.7.

198. *Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562. See *supra* notes 104-08 and accompanying text.

199. 515 F. Supp. 1264 (D. Mont. 1981), *vacated*, 685 F.2d 1088 (9th Cir. 1982). The Miller-Wohl Co. fired an employee because she missed several days of work due to pregnancy. The company had no sick leave policy for any illness during the first year of employment. The employee charged that the employer violated the Montana Maternity Leave Act (MMLA) and the Commissioner found for the employee. In response, the company filed a declaratory judgment action maintaining that the MMLA was preempted by the PDA because the MMLA requires more than equal treatment. *Id.* at 1089. The district court held that the PDA did not preempt the MMLA. *Miller-Wohl*, 515 F. Supp. at 1267.

200. The Montana Maternity Leave Act provides:

cause of pregnancy and refusing them a reasonable leave of absence.<sup>201</sup> The court rejected the argument that the PDA and MMLA conflict.<sup>202</sup> The court noted that Congress did not intend to exclude state laws on employment discrimination.<sup>203</sup> The employer could comply with both statutes if it raised the benefits for other nonoccupational disabilities in line with the MMLA's requirements for pregnancy. Such a policy would protect pregnancy-disabled women, and at the same time provide equal treatment for all employees.<sup>204</sup> The court refuted the argument that the MMLA was undesirable protectionist legislation, and upheld the statute.<sup>205</sup>

In *Miller-Wohl Co. v. Commissioner of Labor and Industry*, jurisdictional conflicts gave the Montana Supreme Court an opportunity to review the MMLA.<sup>206</sup> The Montana court also upheld the statute. It

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It shall be unlawful for an employer or his agent to:

- (1) terminate a woman's employment because of her pregnancy;
- (2) refuse to grant to the employee a reasonable leave of absence for such pregnancy;
- (3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; or
- (4) require that an employee take a mandatory maternity leave for an unreasonable length of time . . . .

. . .

[U]pon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

MONT. CODE ANN. §§ 49-2-310, 49-2-311 (1983).

201. *Id.*

202. *Miller-Wohl*, 515 F. Supp. at 1267.

203. *Id.* The *Guerra* federal district court had rejected a similar proposal. *Guerra*, 34 Fair Empl. Prac. Cas. at 568.

204. *Miller-Wohl*, 515 F. Supp. at 1267. Some see this solution as a workable model. See Williams, *supra* note 9, at 197. Williams noted that there is nothing wrong with the general purpose of the Montana law. Reasonable leave time should be available for all disabilities. The problem arises when it is only provided to a select group.

205. *Miller-Wohl*, 515 F. Supp. at 1267.

206. 692 P.2d 1243 (Mont. 1984), *appeal filed*, No. 84-1545 (U.S. Apr. 9, 1985). The Montana Supreme Court upheld the MMLA following lengthy decisions by other courts hearing the same case. *Id.* at 1254. The federal district court upheld the MMLA. See *supra* notes 197-204 and accompanying text. The Ninth Circuit, however, refused to reach the merits of the case; they determined that the issue was not a federal

said that the purpose of the MMLA is to protect equal job opportunities for women by removing a disability job risk that nonpregnant employees do not face.<sup>207</sup> Because the MMLA's goal is in accordance with Title VII's equality objective, the MMLA's gender-based policy does not violate the PDA.<sup>208</sup> The Montana Supreme Court also suggested that employers could satisfy all interests by bringing all employee disability policies in line with state mandated pregnancy laws, but the court refused to rewrite the law to reflect this opinion.<sup>209</sup>

Another court, dealing with a pregnancy benefit policy under the PDA rather than a special treatment statute, acknowledged the equal opportunity theory. The District of Columbia Court of Appeals addressed the need for adequate leaves of absence in *Abraham v. Graphic Arts International Union*.<sup>210</sup> The court determined that an inadequate maternity leave policy violates Title VII as much as a policy that specifically forbids maternity leave.<sup>211</sup> The court noted that only female employees face job losses from pregnancy.<sup>212</sup> Therefore, a leave policy applied equally to both male and female employees that established a ten day limit on sick leave violated Title VII because of its disparate impact on pregnant employees.<sup>213</sup>

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matter. *Miller-Wohl v. Commissioner of Labor & Indus.*, 685 F.2d 1088 (9th Cir. 1982). Miller-Wohl then petitioned the state court for review of the Commissioner's decision that the company violated the MMLA. The District Court of Cascade County found that the MMLA was discriminatory. 692 P.2d at 1246. The court found that the protective and preferential statute unlawfully favored nondisabled pregnant employees, because they too received leave time. *Id.* Therefore, Title VII preempted the Montana law. *Id.*

207. *Id.* at 1244-45.

208. *Id.* at 1245.

209. *Id.* The ACLU, NOW, and League of Women Voters argued that although the MMLA was protectionist legislation, and a violation of Title VII, the court could preserve the statute by extending its benefits to both sexes. *Id.* at 1253. The Montana Supreme Court, however, noting that such extension would end arguments that the MMLA is discriminatory, refused to extend the benefits to nonpregnant employees. The court instead encouraged the state legislature to enact measures extending the benefits to nonpregnant employees. *Id.* at 1255.

210. 660 F.2d 811 (D.C. Cir. 1981).

211. *Id.* at 819.

212. *Id.* at 817.

213. *Id.* at 819. The court found that the policy was not justified by business necessity. *Id.* See also *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983). In *Brown*, the Fourth Circuit rejected the premise that employers should treat pregnancy like any other illness. It upheld the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12), which prohibited employers from denying pregnancy disability benefits to pregnant workers, regardless of how the employer treats employees

Obviously, the courts have provided different answers to the pregnancy discrimination problem.<sup>214</sup> The confusion stems from the PDA's language, its legislative history and societal values. To resolve the dilemma Congress must reexamine its handiwork.

#### IV. ALTERNATIVE PROPOSALS

What is the proper solution to pregnancy discrimination? Although both the equal treatment and equal opportunity theories purport to be definitive, the answer lies ultimately with Congress. It must reevaluate both the goal it attempted to achieve and the means it implemented to reach that end. As these proposals suggest, perhaps neither theory is correct, and Congress should reformulate the statute through compromise.<sup>215</sup>

##### A. Congressional Reevaluation

The split of authority and the aura of confusion surrounding the PDA require congressional reevaluation of both the rationale and standard underlying the Act. Acting in the wake of *Gilbert*,<sup>216</sup> Congress failed to examine the evidence thoroughly or to consider fully the consequences of its legislation.<sup>217</sup> Had it done both, it is likely that the solution for pregnancy discrimination would more closely resemble the equal opportunity model.

The foregoing overview<sup>218</sup> reveals several major issues requiring con-

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with other disabilities. *Id.* at 1004-05. *See also* *Hanson v. Hutt*, 83 Wash. 2d 195, 517 P.2d 599 (1983) (invalidating a plan that denied unemployment compensation to all disabled workers on grounds that female workers who chose to become mothers, but not male workers who became fathers, lost economic benefits because of their decision to bear children).

214. *See supra* notes 95-137, 189-212 and accompanying text.

215. *See infra* notes 246-76 and accompanying text.

216. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). *See supra* notes 25-31 and accompanying text. Only eight months passed between the Supreme Court's *Gilbert* decision and the introduction of the PDA to Congress.

217. In reaction to the Supreme Court's decisions, Congress acted swiftly. Congress looked at the problem from a factual viewpoint: an employer gave women some benefits, but fewer than those it gave to others with similar disabilities. Congress acted to correct this specific imbalance. It is this narrow focus which fostered the development of the "same treatment" standard; a standard adequate to correct the *Gilbert*-type problem, but not broad enough in scope to provide a solution for all of the pregnancy-related disadvantages suffered by women.

218. *See supra* notes 74-83, 141-63 for a review of the differences between the equal treatment and equal opportunity models for equality in the workplace.

gressional attention. First, Congress should clearly enunciate its purpose.<sup>219</sup> There are indications that the legislators believed equal treatment was the appropriate procedure, but that equal opportunity was the ultimate goal.<sup>220</sup> Neither the debates nor the reports provide sufficient guidance to courts and employers. The multifarious signals bring mixed decisions.<sup>221</sup>

To make an informed policy decision the legislators must examine several pertinent factors. Such factors include: the number of women in the workforce,<sup>222</sup> the number of employees who become pregnant each year,<sup>223</sup> the number of births per worker,<sup>224</sup> the number of employers who provide benefits,<sup>225</sup> the level of benefits provided,<sup>226</sup> bene-

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219. Congress could make the purpose of the PDA clearer by removing it from the definitional section of Title VII (42 U.S.C. § 2000e) to another section containing substantive provisions.

220. See *supra* notes 141-81 and accompanying text (discussing the merits of the equal opportunity standard and the manner in which Congress dealt with the theory).

221. See *supra* notes 84-137 and 164-212 and accompanying text (Congressional and judicial approval of both theories).

222. There are approximately 48.5 million women in the civilian labor force. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, 394 (1985). See 123 CONG. REC. 29,386 (evidence that Congress had similar statistics before them).

223. In 1982, of the 48,666,000 women 18 to 44 years of age who gave birth to a child, 33,224,000 were in the labor force. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, 61 (1984). Eighty-five percent of all women are likely to become pregnant during their working lives. S. KAMERMAN, A. KAHN, & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 25 (1983) (the authors present an in-depth study of the shortcomings of maternity policies in the U.S.).

224. Working women have an average of 2.6 children, requiring an average of three maternity leaves per working mother. These job interruptions reduce job tenure and wages in comparison to male coworkers. Brief of Amici Curiae in Support of Appellants, California Fed. Sav. & Loan v. Guerra, at 4. Kamerman notes the importance of maternity policies in today's society. Several factors favor requiring employers to provide comprehensive pregnancy disability benefits: (1) the growth in the female labor force from 27% of all wives in 1960 to 56% in 1982, with an even higher rate for single mothers (67.7% in 1982); (2) women are having fewer children—birthrates for wives in the 18 to 34 age group fell and lifetime expected births dropped from 3 to 2.2 between 1969 and 1979—making the cost of providing maternity benefits less burdensome; (3) women contribute more to family income than in the past as working wives contribute approximately 26% of family income, and women who work full time all year contribute 39%; (4) women are working longer during their pregnancies, even during the last trimester; (5) women return to work after shorter absences than in the past and the return rates of mothers with young children has grown significantly since 1977. S. KAMERMAN, A. KAHN, & P. KINGSTON, *supra* note 222 at 6-12.

225. See 123 CONG. REC. 29,651-52 (1977). See also S. KAMERMAN, A. KAHN &



fits extended by state statute,<sup>227</sup> the medically recommended length of maternity leave,<sup>228</sup> the length of leave time for other disabilities,<sup>229</sup> the expense of childbearing<sup>230</sup> and the impact inadequate benefits have on the woman.<sup>231</sup> Each factor augments the proposition that women, who must overcome physical, emotional, social and financial pressures stemming from pregnancy, in addition to the comparable nonoccupational disabilities their male coworkers endure, need additional benefits to balance the employment opportunity scales.<sup>232</sup> With these variables

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P. KINGSTON, *supra* note 222, at 47-76, 99-131. The authors review a detailed study of the types of maternity policies. First, they found that one-third of all full-time female employees in the private sector, including almost one-third of those who are not married, do not have health insurance. Part-time workers as well as young women are even more likely to lack coverage. At least 10% of all working women in their child-bearing years lack coverage. Second, about three-fourths of women working at least 20 hours per week are eligible for short, child-birth leaves. Finally, under the PDA, some women working for employers with short-term sickness or disability insurance receive at least some paid maternity leave; however, the smaller employers provide fewer benefits; usually, only upon availability of disability insurance is there a paid leave that lasts beyond a few weeks. *Id.* at 74-76. The authors summarize this chapter by stating: "Progress has been made . . . but the progress has been highly uneven and far less than many believe. Any attempts to private sector provisions for maternity must recognize the pattern of the inequalities. Women in smaller businesses generally are entitled to less generous treatment . . ."

226. *Id.* at 76. The authors note that some companies, but not all, provide one or more maternity benefits, which include health insurance, job-protected leave and wage replacement during leaves. *Id.* at 74-75. *See also* 123 CONG. REC. 29,651-52 (1977).

227. *See* S. KAMERMAN, A. KAHN, & P. KINGSTON, *supra* note 222, at 75-98. The authors note that 75 other countries provide special treatment for pregnant employees. All industrialized countries except the United States require some form of maternity or parental leave by statute. *Id.* at 16-22.

228. Congress had evidence that in 95% of all pregnancy cases the average time lost is six weeks or less. H.R. REP. NO. 948, *supra* note 40, at 4753.

229. Congress compared pregnancy to such disabilities as broken bones, vasectomies and hair transplants. *See* 123 CONG. REC. 29,641, 29,654 (1977).

230. *See* 123 CONG. REC. 29,387 (Remarks of Sen. Javits). In 1982 the cost of having a child was about \$2,300. In 1982, the average cost of caesarean section was \$3,554. S. KAMERMAN, A. KAHN & P. KINGSTON, *supra* note 222, at 47-48.

231. The labor force participation rate of mothers with children under one year increased from 32% to 42% between 1977 and 1982. *See* S. KAMERMAN, A. KAHN, & P. KINGSTON, *supra* note 222, at 121. Congress also had before it evidence of the impact of pregnancy on women with families who were deprived of pregnancy-related benefits. *See* 123 CONG. REC. 29,388-89 (1977) (remarks of Sen. Kennedy).

232. Taking into account the inadequacy of some policies, a woman not only has to deal with the physical and financial cost of the pregnancy, but she also must wrestle with the impact on her family. Women also must cope with the fact that employers often pay them less than male coworkers for time they do work. *See* 123 CONG. REC. 29,387 (1977) (remarks of Sen. Javits). They must also deal with nongender related

in mind, equal opportunity appears to be the more realistic goal.

Another problem requiring congressional attention arises when employers supply no, or inadequate, disability benefits. When employers provide minimal benefits to all disabled employees for disabilities unrelated to gender, the policy applies to men and women equally.<sup>233</sup> Nevertheless, the inadequate policy imposes an additional burden on women employees who are uniquely in need of pregnancy benefits.<sup>234</sup> An inadequate leave policy places female employees who become pregnant at a disadvantage.<sup>235</sup> Where the inequality affects one sex exclusively, preferential treatment is necessary to restore equality of employment opportunity.<sup>236</sup> The PDA does not account for policies that place females in such disadvantaged positions.

Finally, Congress must consider the constraints that its rigid standard produces. The PDA places both a floor and a ceiling on the benefits an employer can provide pregnant employees.<sup>237</sup> The floor aids those women whose employers provide for other nonoccupational disa-

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illnesses, such as heart attacks, strokes and broken bones. Additionally, the median salary of women is only three-fifths of the median salary of male employees. *Id.* See *supra* note 59.

233. Larson notes:

Suppose the employer generally limits sick leave to one month, but grants four months' maternity leave. Suppose a male employee contracts hepatitis and is unable to work for four months. Should he be heard to complain that he is being discriminated against on the ground of sex, because the kind of physical disability he is capable of does not entitle him to as long a leave as pregnant female employees get? Although this line of argument might seem to have some force, it does not hold up on close scrutiny. Recall that we began with an inherent physical inequality affecting employability of one sex exclusively; to offset that inequality and restore equality of employment opportunity, it was necessary to afford an unequal benefit in the form of maternity leave. Equality of employment opportunity having been thus restored, nothing further is needed to redress the male-female balance. After all, females would still be subject to the same one-month limit as males for hepatitis.

A. LARSON, *supra* note 141, § 38.22, at 8-34.

234. *Id.*

235. *Id.* § 38.22, at 8-31 to 8-35.

236. See Note, *supra* note 141, at 707.

237. The employer may provide neither more nor fewer benefits to pregnant workers. "Women affected by pregnancy . . . shall be treated *the same* for all employment related purposes . . . as other persons not so affected in their ability or inability to work." 42 U.S.C. 2000e(k) (emphasis added). The courts, however, sometimes interpret the Act to remove this rigid standard. See *Guerra*, 758 F.2d at 395, 396; *Miller-Wohl*, 692 P.2d at 1251. Whether these courts properly interpret the Act and its legislative history is questionable. Congressional re-education would eliminate any doubt.

bilities.<sup>238</sup> The ceiling, however, restricts the pregnancy-related benefits to equal the benefits available to all employees.<sup>239</sup> This prevents an employer from making his own business decisions. Despite the value of female labor to the enterprise, an employer may not provide specially for pregnancy-related disabilities to appease these workers without providing similar benefits to all.<sup>240</sup> Equal treatment could harm an employer even though he believed it in the best interest of his business to provide women pregnancy-related benefits.<sup>241</sup>

In addition, the ceiling prevents states from exercising their police power. The state that provides pregnancy-related benefits runs the risk that a court will rule that its efforts are federally preempted.<sup>242</sup> The state is estopped from providing reasonable pregnancy benefits even though the economic makeup of the state calls for such measures or the people demand these benefits.

In attempting to "clarify"<sup>243</sup> the pregnancy discrimination problem, Congress left questions unanswered and consequences unexamined. The Act also created additional problems. Unable to pinpoint the congressional goal, courts are rendering inconsistent decisions. Although not specifically rewriting the PDA, the judicial trend seems to interpret the second clause of the Act not as "women affected by pregnancy shall be treated the [very] same as other persons . . . similar in their ability to

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238. For example, if an employer provides 10 days leave of absence for all nonoccupational disabilities, the pregnant employee is entitled to 10 days leave of absence for the pregnancy-related disability. See, e.g., 29 C.F.R. 1604.10(b) (1985).

239. Once again, the employer can only provide the very "same" benefits for the pregnancy-related disability. He can provide no more.

240. See 42 U.S.C. 2000e(k); see also *supra* notes 74-83 and accompanying text. The Ninth Circuit specifically referred to this "floor-ceiling" relationship in *Guerra*. See 728 F.2d at 396.

241. There are several factors that could influence the employer. In certain work environments the disability rate could be greater for women than men depending on the age of the group in question. The pattern may vary with the place of employment, locality, geographical region, ethnic background and other factors. See U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1985). An employer with a large female labor force may decide it is in his economic best interest to provide women with pregnancy related benefits to retain good workers. Some congressmen felt that the decision on pregnancy-related benefits should be left to mechanisms such as collective bargaining. See 123 CONG. REC. 29,659 (1977) (remarks of Sen. Helms).

242. See, e.g., *Guerra*, 34 Fair Empl. Prac. Cas. at 563 (although later reversed, the District Court held the California law favoring pregnancy-related disabilities null and void). See *supra* notes 104-08 and accompanying text.

243. See *supra* notes 44-61 and accompanying text.

work . . .," but rather as "women affected by pregnancy shall be treated [at least the] same as other persons . . . similar in their ability to work . . . ." <sup>244</sup> These two possible interpretations leave courts, as well as employees, without true guidance. Therefore, to accomplish the goal of equality in treatment and opportunity, Congress must reevaluate and reformulate its solution to pregnancy discrimination. <sup>245</sup> A more precise explanation of the pregnancy discrimination policy would curtail the battle between equal treatment and equal opportunity theorists. <sup>246</sup>

### B. *Alternatives*

Upon reexamination, Congress is likely to rearticulate its goal in equal opportunity language. <sup>247</sup> Consequently, it also must reformulate the means to reach the end. Because critics have attacked both the pure preferential treatment and same treatment models, compromise legislation may furnish a conduit to the equal opportunity goal. There are two possible compromise solutions, <sup>248</sup> one "permissive" and one "mandatory."

The first is for Congress to reformulate the PDA, making the same treatment standard a floor for benefits that employers must provide, but lifting the ceiling on what they may provide. <sup>249</sup> Under this ap-

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244. 42 U.S.C. § 2000e(k) (1981). This reading of the PDA seems to be increasingly popular. Perhaps this is a hint to congressmen that they should act promptly to implement a pregnancy discrimination policy as outlined in recent cases.

245. See *supra* notes 214-43 and accompanying text.

246. As previously noted, parties in the pregnancy debate each attempt to interpret the PDA to support their view. See *supra* notes 81-85, 141-63 and accompanying text. Congressional narrowing or clarifying may end this attempt to read into the PDA purposes that the legislators may not have intended. Although congressional redefinition of the federal pregnancy policy probably will not satisfy all parties involved, Congress at least can provide a more focused scheme that courts, states and employers can easily apply to pregnancy policies.

247. See *supra* notes 141-63 and accompanying text (discussing the equal opportunity theory). Congress should take into consideration the possibility of a remedy for disparate impact. Some believe the PDA, if interpreted correctly already does this. See Note, *supra* note 141. One author believes it is unwise to treat pregnancy like any other disability, and Congress should therefore follow the lead of states that provide special treatment for pregnancy. Note, *Equality in the Workplace: Is That Enough for Pregnant Workers?* 23 J. FAM. L. 401, 417-18 (1984-85).

248. These two theories are not suggested as the only possible solutions to the pregnancy discrimination dilemma.

249. As previously noted, the Ninth Circuit already has interpreted the PDA as placing a limit on the minimum benefits states could require employers to provide, not a

proach, women would retain benefits gained under the 1978 Act,<sup>250</sup> and would be eligible for any additional benefits the employer or state may provide to alleviate disparate impact.<sup>251</sup>

This compromise solution is permissive because employers may legally provide additional benefits to pregnant employees. This proposal has many strong points. First, women retain the benefits they presently enjoy. A plan left to the whim of employers or states could relegate pregnancy benefits to their pre-1978 status.<sup>252</sup> Second, the proposal provides a means to distinguish pregnancy from other nonoccupational disabilities and to account for the inherent physical and mental complications of pregnancy. The state or employer may look to the disability itself.<sup>253</sup>

Third, although not guaranteeing equal opportunity, the proposal gives women a chance to attain equal opportunity. The proposal takes the decisionmaking power from the strictures of the federal government and gives it to those in a better position to evaluate the social and economic needs of the work force. The state or employer can furnish benefits in accordance with the composition of the work force, the attitudes of the population and the economic welfare of the business.<sup>254</sup> Either of these two groups is in a better position than the federal government to balance the needs of its workers against the economic and other consequences of special legislation.<sup>255</sup> Obviously, some legisla-

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cap on the maximum amounts the states could require them to give to pregnant employees. *Guerra*, 758 F.2d at 396. See *supra* notes 190-96 and accompanying text.

250. Women would receive at least the same level of benefits for pregnancy-related disabilities as the employer provides for other disabilities that similarly affect the ability to work. 42 U.S.C. 2000e(k) (1981).

251. See, e.g., MONT. CODE ANN. § 49-2-310 (1983). The state could provide additional benefits if called for by popular vote or if the legislators think it necessary under the state police power. The employer could provide benefits called for in collective bargaining or decided upon in its own business judgment. There may be equal protection challenges to this type of action, but the Montana federal district court did not find an equal protection problem with the MMLA. Although its decision was vacated later on jurisdictional grounds, the district court upheld the statute against the equal protection challenge. *Miller-Wohl*, 515 F. Supp. at 1266.

252. See, e.g., *Gilbert*, 429 U.S. 125. See *supra* notes 25-31 and accompanying text.

253. See Krieger & Cooney, *supra* note 10. See also *supra* notes 141-63 and accompanying text.

254. See *supra* notes 218-28 and accompanying text.

255. See *supra* notes 80-83 and accompanying text. In addition to the advantages state legislators have by being closer to local employment situations, state courts are also in a better position to concentrate on problems within their own states. As one author notes:

tors found increased benefits best for their citizens.<sup>256</sup> Additionally, because an employer is in a better position than the federal government to assess his business requirements and to monitor employee needs, he is better able to negotiate a mutually beneficial disability plan.

If decisionmaking rests with a smaller body more closely associated with the employees, women have a better chance to advance their position because it is easier to influence a smaller group of decisionmakers.<sup>257</sup> Lower level decisionmakers are also in a better position to monitor the effects of the disability policy and readjust the plan should the factors in the balance change.<sup>258</sup> Therefore, the proposal provides a better chance for equal opportunity.

This proposal, however, is not totally flawless. It fails to provide immediately for those women who presently receive no benefits for nonoccupational disabilities.<sup>259</sup> The proposal, however, does allow

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State courts may be in a better position to review local economic legislation than the Supreme Court. State courts . . . may better adapt their decisions to local economic conditions and needs . . . . And where an industry is of basic importance to the economy of a state or territory, extraordinary regulations may be necessary and proper.

Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 N.W. U.L. REV. 226, 250 (1958).

256. To the employer, who will probably distribute the same amount of profits to employees in salaries or benefits even if he does provide pregnancy benefits, the allocation of costs may not matter. Therefore, men have an incentive to push for greater benefits because of the Supreme Court's *Newport News* decision that employers must provide the same level of benefits to employees of both sexes in policies that extend to the employees' spouses. See 462 U.S. 669. See *supra* notes 100-03 and accompanying text. Men, realizing that they may gain medical coverage for their spouses, may be more willing to negotiate for pregnancy benefits. See Kirby & Robyn, *Pregnancy, Justice and the Justices*, 57 TEX. L. REV. 947 (1979).

257. The organization and expense of a campaign for pregnancy-benefits is a much easier task if the forum is closer and more accessible to the proponents.

258. If the makeup of the workforce changes within a business, or economic conditions make it unreasonable to continue benefits, the employer could lower them to a level equal to other disability benefits. Likewise, if results are favorable, he could raise them.

259. See *supra* notes 141-63 and accompanying text. The employers or local governments may be too close to the situation and know too well the economic advantages of discrimination against pregnant workers. They may determine that their minimum level of benefits, to which they compare benefits for all workers, is zero. This determination would not help any of the workers. Despite this limitation, unlike the strict reading of the PDA's sameness language, the proposal recommended herein provides a framework through which employers may account for the immutable sexual difference between men and women that makes the difference in a woman's struggle for equal opportunity.

states or employers to fill this gap without threat of preemption.<sup>260</sup> Furthermore, the plan does not answer all of the questions posed by the equal treatment advocates who find special legislation dangerous.<sup>261</sup> The proposal also hinders uniformity, because various states and employers are free to develop individualized plans that they deem best for their female workers.<sup>262</sup>

The "permissive" model has additional problems. Given an equal opportunity goal, legislation that merely permits preferential treatment is inadequate when employers choose to omit all temporary disability benefits from employment programs.<sup>263</sup> Studies show that, even under the PDA, approximately one-half of the female labor force lacks adequate income and job protection at the time of childbirth.<sup>264</sup> Consequently, leaving pregnancy benefit policies to the employer's discretion may leave many women with nothing.

The second proposal addresses the shortcomings suffered by the permissive model. To alleviate the inequities that a permissive pregnancy discrimination statute could create,<sup>265</sup> Congress should reformulate pregnancy legislation to require employers to implement policies that provide reasonable pregnancy disability benefits.<sup>266</sup> To avoid charges of protectionism, Congress should require employers to provide the same level of benefits to all employees that it affords pregnant workers.<sup>267</sup> Such mandatory legislation would embrace both the equal op-

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260. See *supra* notes 152-57 and accompanying text.

261. See *supra* notes 80-83 and accompanying text.

262. See *supra* notes 232-35 and accompanying text.

263. See *supra* notes 258-61 and accompanying text (shortcomings of the first proposed solution).

264. See S. KAMERMAN, A. KAHN & P. KINGSTON, *supra* note 222, at 141. The authors summarize results of the Columbia University study presented in the book. *Id.* at 38. They conclude that the United States does not have an adequate maternity policy. *Id.* at 147.

265. See *supra* notes 80-83 and accompanying text (pitfalls of permissive pregnancy discrimination legislation).

266. This proposal does not leave the decision to the state. This may engender a debate as to within whose realm of authority the pregnancy discrimination question falls. See *infra* notes 272-74 and accompanying text.

267. Others have proposed nation-wide disability legislation. They argue that no women should lose their jobs because they are pregnant, but neither should they face horrors of protectionist legislation. See N.Y. Times, July 22, 1984 at F23 (quoting Isabelle Katz Pinzler, a woman's rights attorney at ACLU). Consequently, these commentators argue that the solution is temporary disability leave for all workers. *Id.* The Montana Supreme Court, in *Miller-Wohl*, agreed with ACLU, NOW and the League of Women Voters that the maternity benefits provided by a Montana statute should be

portunity theory of accommodating the peculiarities of pregnancy and the equal treatment theory of sameness in application.

There is merit to this "mandatory" proposal. First, all employers must provide reasonable pregnancy disability benefits, thereby assuring pregnant workers of some benefits and an increased chance for equal opportunity in the workplace. Second, this model furthers the goal of equality in effect, because all workers receive the same level of temporary disability benefits.<sup>268</sup> This decreases the worker hostility that a preferential treatment plan might engender.<sup>269</sup> Third, the flexibility of this proposal allows an employer to decide the specifics of the policy; he can thus account for the peculiarities of pregnancy, composition of his workforce and extent of his finances. Consequently, the person closest to the economic situation of a specific business formulates a workable policy, within the statutory boundaries, and applies it accordingly.<sup>270</sup> Fourth, the "mandatory" proposal does not restrict the level of benefits. Like the "permissive" proposal, it does not directly cap the level that employers may provide for pregnancy disabilities.<sup>271</sup>

This proposal, however, is also not flawless.<sup>272</sup> First, the proposal embodies a reasonableness standard. The question of what is reasonable is inevitably raised. Consequently, the question of who initially

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extended to all workers. 642 P.2d at 1253-55. The Montana Supreme Court agreed with the suggestion that the employer could comply with both the preferential treatment standard and the PDA by amending its disability policy to allow reasonable leaves of absence, required by the Montana law, to any first-year employee who misses work due to disability. The court, however, left the decision to the state legislature. *Id.* at 1255. See also *Miller-Wohl*, 515 F. Supp. at 1267 (the federal district court made the same suggestion).

268. This proposal in effect forces employers to provide disability benefits for all temporary disabilities because requiring employers to apply the same level of benefits across the board covers disabilities not previously included in any disability plan.

269. See *supra* notes 80-83 and accompanying text (enumeration of problems equal treatment theorists claim preferential treatment engenders).

270. The reasonableness standard is preferable to a fixed standard which forces all employers who are not in the same businesses or financial positions to comply with a particular requirement. A fixed standard may not cause problems for policies such as assuring temporarily disabled employees the same or similar job upon return to work, but regulations providing a fixed stipend for time away from the job may unduly burden some employers if the stipend is high. See *infra* note 274 and accompanying text.

271. One effect of the proposal, however, may be to keep disability policies at the lower end of the scale, yet within the bounds of reasonableness, because employers will have to cover all temporary disabilities according to the benefit provided pregnant employees.

272. See *supra* notes 80-83 and accompanying text (flaws of permissive legislation).



determines what is reasonable—Congress, an administrative agency, the state or the employer—is also raised.<sup>273</sup> A possible answer to the question is that the EEOC could formulate limits on various aspects of maternity policies, leaving room for employer discretion.<sup>274</sup> Second, critics may question the use of pregnancy as a yardstick. Measuring all disability benefits by those levied to afford pregnant workers equal opportunity may not be practical when applied to workers temporarily disabled by various other illnesses.<sup>275</sup> Finally, the “mandatory” model eliminates the middleman—the state government. The power to regulate maternity policies as a means of protecting the health and welfare of its citizens may well be considered a power traditionally left to the states. If so, any attempt at mandatory federal regulation could be subject to attack under the tenth amendment.<sup>276</sup> Judicial approval of state maternity legislation verifies the claim that pregnancy discrimination is an area in which states may properly legislate.<sup>277</sup> The preemption question would loom over this proposal, much as it does the PDA, unless Congress specifically prohibits or endorses state legislation in this area.<sup>278</sup>

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273. The judiciary will figure prominently into the process. Regardless of who initially decides the criteria defining the boundaries of reasonableness, the court will probably review that decision.

274. The EEOC could address the problem much as it did the sameness standard of the PDA. See 29 C.F.R. 1604.10 (1985). This would provide upper and lower boundaries, and give employers and courts a guide to proper pregnancy policies.

275. A rigid set of rules may cause greater problems than the discretionary method with a reasonableness standard. For example, California requires four months of pregnancy disability leave. See *supra* note 105. This standard, applied across the board, may endanger production if all temporarily disabled employers receive four months leave. Under a reasonableness standard employers can look at their workforce in light of the reasonableness standard and formulate policies to accommodate pregnant workers while still protecting themselves. A black-letter rule has advantages in that it decreases argument over congressional intent because no one would have discretion to deviate from the imposed requirements. Also, each employer would have a specific guide, freeing him from decisionmaking. The problems a black-letter rule could create, as noted above, override the benefits it supplies. Therefore, a flexible standard accommodating employer and employee seems preferable.

276. U.S. CONST. amend X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” See *supra* notes 152-55, 241 and accompanying text (regarding federal preemption of state statutes).

277. See *supra* notes 190-208 and accompanying text (judicial approval of Montana and California maternity policies).

278. See *supra* notes 151-56 and accompanying text (preemption problems under the PDA).

These proposals are laudable in some respects, but flawed in others. They are not definitive answers to pregnancy discrimination problems. They do, however, eliminate weaknesses in the present legislation and suggest possible alternative solutions.

## V. CONCLUSION

One can determine from the split of authority examined herein that the PDA does not solve, or even address, all pregnancy discrimination problems. Congress must re-evaluate the law, using all available information, to rearticulate the goal and reformulate the means to attain that goal. Congress must respond to the difficulties that courts, employers and workers encounter under the present form of the PDA. To end much of the confusion, Congress must thoroughly re-examine the evidence, consequences and alternatives concerning pregnancy discrimination. As a result, they may attain the "common sense" resolution to pregnancy discrimination they sought in 1978.<sup>279</sup>

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279. See 42 U.S.C. § 2000e(k) (1985).



## **COMMENTS**

